Office - Supreme Court, U. S.
FILED
AUG 24 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term—1943.

No. 282

JACK LISS and FRANK CONTE,
Petitioners,

AGAINST

UNITED STATES OF AMERICA,
Respondent.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

CHARLES B. HALLEY,
Counsel for Petitioners.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

INDEX.

	PAGE
Petition	1
Summary Statement of Matter Involved	1
Questions Presented	3
Reasons Relied on for the Allowance of the Writ	3
Brief in Support of the Petition	7
Opinions of the Court Below	7
Grounds Upon Which the Jurisdiction of This Court Is Invoked	7
Statement of the Case	8
Specifications of Errors	8
Summary of the Argument	9
Argument	10
I.—The trial court's concededly obscure charge and its erroneous refusal to accept requests to charge were substantially prejudicial to the rights of petitioners and cannot be assumed to be harmless error	10
II.—Proof of purchases by the petitioners of lead and opium wash, without proof of an illicit plan, is insufficient to sustain a conviction of conspiracy to evade Section 2551-a of the Internal Revenue Code	11
III.—Prejudicial variance existed between the single conspiracy charged in the indictment and the crimes established by the evidence	13

PAGE

IV.—The petitioners were deprived of their liberty without due process of law by 14

A. The Government's use on appeal of a different theory from the one on which the case was tried in the court below .. 14

B. The Trial Judge's conduct throughout the course of the trial and the United States Attorney's prejudicial comments 16

Conclusion 20

Appendix A 21

Appendix B 21

Appendix C 22

Appendix D 22

CASES CITED.

	PAGE
Berger v. U. S., 295 U. S. 78 (1935)	10, 13
Betts v. Brady, 316 U. S. 455, 462	16
Bruno v. U. S., 308 U. S. 287	4, 11
Fillippon v. Albion Vein Slate Co., 250 U. S. 76	4
Fort Dodge Hotel Co. v. Bartelt, 119 Fed. 2nd, 253, 259	4, 11
Hickory v. U. S., 160 U. S. 408	6
Keller v. Brooklyn Bus Corp., 128 Fed. 2nd, 519	4
McCandless v. U. S., 298 U. S. 342, 347-348	4, 11
Morrison v. California, 291 U. S. 82	12
Starr v. U. S., 153 U. S. 614	6
United States of America, Appellee v. Jack Liss, et al., Appellants	6
U. S. v. River Rouge, 269 U. S. 411	4

STATUTES CITED.

Judicial Code of the United States, Title 28 U. S. Code, Section 347, Subdivision a (Judicial Code, Section 240a as Amended)	21
Constitution of the United States, Amendment V	21
Chapter 28, U. S. C. A., Section 391	22
Title 26, U. S. Code, Section 2551a	22

IN THE

Supreme Court of the United States

OCTOBER TERM—1943.

JACK LISS and FRANK CONTE, *Petitioners,* AGAINST UNITED STATES OF AMERICA, *Respondent.*	No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioners, Jack Liss and Frank Conte, respectfully represent the following:

I.—Summary Statement of Matter Involved.

Petitioners were convicted by a jury after a trial in the United States District Court for the Southern District of New York upon an indictment, (R. 4-11) charging them and others with having conspired to violate the provisions of the Internal Revenue Code regulating the sale and dispensing of narcotic drugs.

Petitioner, Jack Liss, was sentenced to serve a term of two years and to pay a fine of $5,000 (R. 817). Petitioner, Frank Conte was sentenced to serve a term of eighteen months and to pay a fine of $1,000 (R. 817).

Petitioners appealed to the United States Circuit Court of Appeals for the Second Circuit upon various grounds.

The Circuit Court in a majority opinion (R. 898-910) by Mr. Justice Hand, concurred in by Mr. Justice Swan, affirmed the conviction as to all the appellants except Palmer, Geffner, and Jaffe. Mr. Justice Frank, in a separate opinion, dissented and held for reversal of the conviction and the dismissal of the indictment as to all the defendants except petitioners.

Upon motion for re-argument made by the appellant, David Rudy, the Circuit Court of Appeals reversed the verdict of conviction as to Rudy in a *per curiam* opinion (R. 932).

The Circuit Court of Appeals in the majority opinion divided the alleged conspiracy into three separate conspiracies, to wit: 1st. The attempted synthesis of morphine which they decided was not illegal and which they disregarded (R. 900); 2nd. The extraction of the narcotic base from certain exempt preparations of limited narcotic content which they decided failed and was abandoned (R. 900); 3rd. The attempted diversion of opium by the circuitous circulation of lead and opium wash which the Court decided was not proved (R. 900-901). The Circuit Court of Appeals however, proceeded to affirm the conviction by holding that the Government did not attempt on appeal to sustain the conviction on the latter theory but on the theory that the Government had proved a conspiracy to evade the regulations governing the sale of preparations of limited narcotic content, Section 2551-a Title 26, U. S. Code (R. 901). Mr. Justice Frank in a dissenting opinion held that the variance between the single conspiracy set forth in the indictment and the proof

of three separate conspiracies coupled with the obscure and unenlightening charge of the trial court was substantial error (R. 910-913).

II.—Questions Presented.

I.—Whether the Trial Judge's obscure charge and his refusal to accept requests to charge, conceded to be error by the Circuit Court of Appeals, were substantially prejudicial to petitioners under Section 269 of the Judicial Code as amended (Chapter 28, U. S. C. A., Section 391) and must, therefore, be presumed to be harmful.

II.—Whether the proof of mere purchases of a preparation of limited narcotic content without proof of an illegal plan can be made the basis of a conviction for conspiring to evade Section 2551-a of the Internal Revenue Code.

III.—Whether the proof of several distinct conspiracies instead of the single one alleged, and the submission of multiple and complex issues involving numerous defendants prejudiced the consideration of petitioners' case by the jury and constituted fatal variance.

IV.—Whether the petitioners have been deprived of their liberty without due process of law by reason of

(a) the Government's substitution of an entirely new theory of guilt for the first time on appeal.

(b) The prejudicial manner of the trial Judge in and during the conduct of the trial and the prejudicial remarks of the United States Attorney.

III.—Reasons Relied on for the Allowance of the Writ.

I.—There is a diversity of opinion between the Circuit Courts of Appeals for the Second Circuit and the

Eighth Circuit as to whether or not conceded error should be presumed to be harmless and therefore disregarded as not substantially prejudicial. The Second Circuit seems to be disinclined to follow the trend initiated by the Supreme Court in the case of *McCandless* v. *U. S.*, 298 U. S. 342, 347-348. In the case at Bar, the Second Circuit seems to hold that the modern disposition is to assume that error has been harmless. (Also see *Keller* v. *Brooklyn Bus Corp.*, 128 Fed. 2nd, 519.) The Eighth Circuit in *Fort Dodge Hotel Co.* v. *Bartelt*, 119 Fed. 2nd, 253, 259, holds that error to the substantial rights of a party is grounds for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial. The Supreme Court has likewise similarly held in many cases. *Bruno* v. *U. S.*, 308 U. S. 287; *U. S.* v. *River Rouge*, 269 U. S. 411; *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76.

II.—This case involves an important question affecting the Federal law of criminal conspiracy. The evidence showed that petitioners made large purchases of lead and opium wash from various druggists. As set forth in the indictment and in the opening remarks of the United States Attorney, the theory upon which the Government tried this "phase" of the conspiracy was that petitioners were engaged in a conspiracy by which they attempted to divert opium by circulating quantities of lead and opium wash through various druggists but that ultimately the lead and opium wash found its way back to a manfacturer who in this way was able to obtain further quantities of opium to be used in the preparation of lead and opium wash, but which in reality was never used for such purpose. The Circuit Court admitted that if such was the plan, it was never proved but stated that the prosecution *on appeal* did not seek to maintain the conviction on that theory. What the Government did assert on appeal was that it proved a conspiracy to violate the regulations

governing the sale of preparations of limited narcotic content, Section 2551-a, Title 26, United States Code. Petitioners contend that all the Government proved was that they purchased certain quantities of lead and opium wash; that the Government failed to prove that said lead and opium wash was purchased for non-medicinal purposes and most important that the Government failed to prove that these purchases were made pursuant to a plan aiming at the evasion of the pertinent Sections of the United States Code. Petitioners believe that the holding of the Circuit Court seriously affects the judicial administration of Criminal Law and materially prejudices the trial of a defendant.

III.—This case involves another important question affecting the law of criminal conspiracy. The evidence showed, and it was conceded by the Circuit Court, that the Government proved three separate conspiracies instead of the single conspiracy set forth in the indictment (R. 900). The Circuit Court in violation of its own concessions that three separate conspiracies existed held that this was not a harmful variance and affirmed the conviction. Petitioners contend that the trial court's admission of evidence as to three separate conspiracies was reversible error since it could be used cumulatively against any of the defendants, especially since both the Trial Court and the Circuit Court conceded that the first conspiracy, to wit: the attempted synthesis of morphine was not illegal; that the second conspiracy, to wit: the attempted extraction of the narcotic base from preparations of limited narcotic content failed and was abandoned; and that the third conspiracy, to wit: the attempted diversion of opium by the circuitous circulation of lead and opium wash was never proved. The Circuit Court's admission of such variance therefore warranted a reversal of conviction. Petitioners believe that the holding of the Circuit Court seriously af-

fects the judicial administration of criminal law and materially prejudices the trial of a defendant.

IV.—The Circuit Court of Appeals for the Second Circuit has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court in that the Circuit Court of Appeals has affirmed a judgment of conviction and sentence of imprisonment wherein, tested by an appraisal of the decisions in *Hickory* v. *U. S.*, 160 U. S. 408; *Starr* v. *U. S.*, 153 U. S. 614, and innumerable other Supreme Court decisions, the petitioner was deprived of his liberty without due process of law.

Wherefore, your petitioners pray that writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit directing said Court to certify and send to this Court a full and complete transcript of the record and the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, calendar #223, *United States of America, Appellee* v. *Jack Liss, et al., Appellants,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that judgment herein of said Circuit Court of Appeals be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Dated: August 20, 1943.

JACK LISS AND FRANK CONTE,

By CHARLES B. HALLEY,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM—1943.

JACK LISS and FRANK CONTE, *Petitioners,* AGAINST UNITED STATES OF AMERICA, *Respondent.*	No.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.—Opinions of the Court Below.

There was no opinion rendered by the Trial Court relating to the within petitioners. The opinions of the Circuit Court below (R. 898-918) rendered May 28, 1943 are still unreported. The *per curiam* opinion of the Circuit Court granting the motion for reargument with respect to the defendant Rudy has not as yet been officially reported but appears in the record (R. 932).

II.—Grounds Upon Which the Jurisdiction of This Court Is Invoked.

A. The United States Circuit Court of Appeals for the Second Circuit made its order for mandate herein on August 3, 1943 (R. 933).

B. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. Code, Section 347 sub-division a (Judicial Code, Section 240a as amended) and Rule 38 of Revised Rules, 1939, of the Supreme Court of the United States.

C. The Circuit Court affirmed a conviction and judgment of sentence of imprisonment in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States. The jurisdiction of this Court is invoked pursuant to said Fifth Amendment to the Constitution of the United States.

D. The reasons stated in the preceding petition, under III (pp. 3 to 6), herewith adopted and made a part of this brief, are believed to constitute good grounds for invoking the jurisdiction of this Court.

III.—Statement of the Case.

A statement of the case has been made in the preceding petition under I (pp. 1-3) which is hereby adopted and made a part of this brief.

IV.—Specifications of Errors.

A. The Circuit Court erred in holding that the Trial Court's concededly obscure charge and its refusal to accept requests to charge did not prejudice the substantial rights of the petitioners but that such error is presumed harmless (R. 904-906).

B. The Circuit Court erred in holding that proof of purchases by the petitioners of quantities of lead and opium wash was sufficient to sustain a conviction of conspiring to evade Section 2551-a, Title 26, United States Code without proof by the Government of an illicit plan to evade such sections.

C. The Circuit Court erred in holding that there was no fatal variance between the conspiracy charged in the indictment and the proof offered on trial (R. 902-904).

D. The Circuit Court erred in permitting the Government to use on appeal a different theory from the one on which the case was tried in the Court below, to wit: The substitution of the theory that the petitioners had conspired to violate Section 2551a of the Internal Revenue Code in place of what appeared to be the original theory (R. 900-901), that the petitioner had conspired to circulate lead wash in an attempt to divert opium which was to be sold in the underworld. The Circuit Court erred in holding that the conduct of the Trial Judge and the remarks of the United States Attorney were not prejudicial to the rights of petitioner (R. 904-905).

Summary of the Argument.

A. Petitioners have the right to take advantage of Chapter 28, U. S. C. A., Section 391. The Trial Judge's charge was admittedly obscure and unenlightening and was prejudicial to the substantial rights of the petitioners. The Trial Court's erroneous refusal to accept requests to charge was prejudicial to the substantial rights of the petitioners. That all of these errors on the part of the Court cannot be presumed harmless.

B. Since the Circuit Court of Appeals conceded that the circuitous circulation theory was never proved, the Government was left only with proof of purchases by petitioners of lead and opium wash without proof of an illicit plan to evade the pertinent sections of the Internal Revenue Code. Proof of an illicit plan is essential to a conviction for conspiracy.

C. Prejudicial variance existed between the single conspiracy charged in the indictment and the crimes estab-

lished by the evidence. Application of the rule in *Berger* v. *U. S.*, 295 U. S. 78 (1935) required the granting of petitioners' motion made in the trial court to dismiss the indictment, to acquit the petitioners and to set aside the verdict.

D. It is a universally accepted rule of law that a case may not be tried on one theory in the Court below and on another theory in an Appellate Court. The protection afforded a defendant in a criminal proceeding by the Due Process Clause of the Fifth Amendment to the Constitution was violated by the trial judge's persistent and prejudicial conduct throughout the course of the trial and the United States Attorney's comment on the failure of the petitioners to call character witnesses.

ARGUMENT.

I.

The trial court's concededly obscure charge and its erroneous refusal to accept requests to charge were substantially prejudicial to the rights of petitioners and cannot be assumed to be harmless error.

The Circuit Court, both in the majority and dissenting opinions, concedes that the charge was in all respects obscure and unenlightening; that it did not advise the Jury of the issues they were to decide and that the wilderness of the trial court's resulting verbiage must have left the Jury pretty much in the dark (R. 905). Despite its admission of the inadequacies of the charge, the Circuit Court proceeded to dispose of this obvious error by reasoning that the modern disposition seems to assume that an error has been harmless (R. 906). This is opposed to the trend initiated by the Supreme Court in the case of

McCandless v. *U. S.*, 298 U. S. 342, 347-348 and followed by the Eighth Circuit in the case of *Fort Dodge Hotel Co.* v. *Bartelt*, 119 Fed. 2nd 253, 259. The Circuit Court did not decide this question on the ground that the petitioners failed to take exception to the trial court's charge, but apparently conceded that the petitioners had the right, under Chapter 28, U. S. C. A., Section 391, to take advantage of such error for the first time on appeal.

The Circuit Court's disposition of this question, therefore, rests solely on the ground that such error will be assumed to be harmless. The Circuit Court's refusal to follow the trend now clearly delineated in the *McCandless* case, *supra*, in *Bruno* v. *U. S.*, 308 U. S. 287, 294, and followed by the Eighth Circuit in *Fort Dodge Hotel Co.* v. *Bartelt*, *supra*, has resulted in a decision in conflict with the decision of another Circuit Court on the same question and in apparent violation of the rule laid down by the Supreme Court.

Mr. Justice Frank in the dissenting opinion was in vehement disagreement with the subjective conclusions of the majority that this error was harmless (R. 917-918).

The same reasoning holds with respect to the trial court's refusal to accept requests to charge.

II.

Proof of purchases by the petitioners of lead and opium wash, without proof of an illicit plan, is insufficient to sustain a conviction of conspiracy to evade Section 2551-a of the Internal Revenue Code.

In its opening remarks, the Government stated it would prove with respect to this "phase" of the conspiracy that the petitioners, with others, conspired to obtain opium by circulating quantities of legally manufactured lead and opium wash among druggists; that ostensibly it

was being sold legitimately, but in reality it found its way back to the manufacturer and was used as a screen for the diversion of opium necessary to produce similar quantities of the preparations; that the diverted opium was then sold in the underworld (R. 23-26). The Circuit Court of Appeals admits that if such was the plan, the Government never proved it but states that the Government on appeal did not seek to maintain the conviction on that theory but on the theory that a conspiracy to violate the regulations governing the sale of preparations of limited narcotic content was sufficiently proved (R. 901).

It is a fundamental principle of the law of conspiracy that proof of an illicit plan is essential before a conviction for conspiracy can be had. *Morrison* v. *California*, 291 U. S. 82.

Since the Circuit Court of Appeals decided that there were three separate conspiracies in this case, the conspiracy now under discussion became an independent one and it was, therefore incumbent upon the Government to prove a separate and distinct illicit plan by which the petitioners hoped to effect their purpose. The Government proved neither a plan nor a purpose.

When the Government's efforts to prove that petitioners were circulating the lead wash in an attempt to divert opium failed, it was left with no other proof but that of the purchase by these petitioners of quantities of lead wash. Since the illegal plan averred by the Government was the diversion of the opium, the original plan once removed from the case left the Government with the commission of substantive acts without proof of a conspiracy. The Circuit Court of Appeals therefore erred in permitting the Government to create on appeal a new theory upon which to sustain the verdict. The Government was virtually allowed to lift out of the indictment sufficient allegations upon which to peg a new theory of guilt.

The Circuit Court of Appeals omitted any expression of opinion as to the existence or illegality of the plan in pursuance of which the petitioners purchased lead wash allegedly in violation of Section 2551a.

III.

Prejudicial variance existed between the single conspiracy charged in the indictment and the crimes established by the evidence.

Application of the rule stated in *Berger* v. *U. S.*, 295 U. S. 78 (1935) required the granting of petitioners' motions at the trial based on such variance. The Circuit Court in its opinion (R. 900, 902) held that, contrary to the all embracing indictment, the following three conspiracies were revealed by the evidence at the trial: (1) the attempted synthesis of morphine; (2) the attempted extraction of the narcotic base from preparations of limited narcotic content; and (3) the attempted diversion of opium by a circuitous circulation of lead and opium wash.

The first conspiracy concededly was not illegal (R. 900). Both the trial court and the Circuit Court admitted that there was nothing illegal in an attempt to synthesize morphine out of harmless drugs (R. 800, 900). The second conspiracy was admitted by the Circuit Court to have been abandoned (R. 900). The third conspiracy was never proved (R. 900-901).

The Supreme Court has indicated in the *Berger* case that a variance is fatal only if prejudice be established. In the instant case the trial court admitted evidence in proof of the first conspiracy which was concededly a perfectly legal enterprise. The admission of such evidence undoubtedly prejudiced the jury because of the volume of testimony admitted in proof of its purportedly illegal nature (R. 29-40) and because it charged the atmosphere of the court with its spectacular quality. This not only

predisposed the jury unfavorably, but served to convince them of the criminal conduct of the petitioners, especially when coupled with the evidence adduced in connection with the second and third conspiracies. Taken cumulatively, all this testimony, constituting about one-third of the trial, served to completely submerge the jury and would have persuaded any jury of the guilt of petitioners. This may not have been true had they been tried separately upon each conspiracy, since the first conspiracy would have been dismissed for lack of illegality; the second conspiracy would have been shown to have been abandoned; and the third conspiracy would have failed for lack of proof.

The prejudicial nature of the variance should be considered, together with the length of the trial, the numerous transactions covered, and the number of defendants. The general character of evidence adduced, the jumble of names, places, and dates, all contributed to the prejudice of petitioners' trial. Motions made in the trial court based on the variance between proof offered and that charged in the indictment should have been granted.

IV.

The petitioners were deprived of their liberty without due process of law by

A. The Government's use on appeal of a different theory from the one on which the case was tried in the court below.

B. The Trial Judge's conduct throughout the course of the trial and the United States Attorney's prejudicial comments.

A. *The Government's use on appeal of a different theory from the one on which the case was tried in the court below.*

That a case may not be tried on one theory in the Court below and on another theory in an Appellate Court

is a principle of law so fundamental and so universal that no citation of authority is necessary.

The Circuit Court decided that three separate conspiracies were shown to have existed rather than the single conspiracy alleged in the indictment (R. 900-901). The Circuit Court in the majority opinion conceded that the Government failed to prove that the petitioners were circulating lead wash according to a preconceived plan by which they attempted to divert quantities of opium to be sold in the underworld (R. 900-901). The opinion went on to state however, that the Government was not *now* seeking to maintain the conviction on that theory, but that the Government was asserting on appeal that it had proved a conspiracy to violate the regulations governing the sale of preparations of limited narcotic content, Section 2551a, Title 26, U. S. Code (R. 901).

A reading of the indictment, however, fails to show precisely which of the allegations pertains to which of the conspiracies. It is difficult to determine which Sections of the Internal Revenue Code were being violated by which of the conspiracies. Moreover, the United States Attorney in his opening remarks stated that the Government would prove that the petitioners were engaged in illicitly circulating lead wash in order to divert opium which was to be illegally sold. Despite this statement by the United States Attorney of the government's theory of action with respect to the lead wash conspiracy, and despite the fact that it decided that there were three separate conspiracies, the Circuit Court of Appeals, nevertheless, permitted the Government to assert on appeal a theory of guilt based solely on the purchases by petitioners of quantities of lead wash which it now asserted was proved on the trial to be in violation of Section 2551-a of the Internal Revenue Code.

The Circuit Court *presumed* the illegal nature of the conspiracy without first *determining* that an illegal plan

existed. It failed to determine, moreover, whether, if this conspiracy had been tried separately under the original theory of the Government, a verdict of guilt could be sustained. The problem is further complicated by the fact that it is impossible to determine whether the Government would have tried this single conspiracy on the theory that it asserted on appeal, or whether it would have tried the petitioners on the original theory. The Circuit Court therefore erred in either refusing or failing to discuss this question and to decide it.

It is respectfully submitted that it was a violation of the Due Process Clause to deprive the petitioners of their liberty by permitting the United States Government to frame an indictment in vague, obscure, and general terms, purporting to allege one conspiracy, but in reality alleging three separate conspiracies; by not informing them of the precise nature of the crime with which they were charged; by not having the issues at the trial clearly defined; by confronting them on appeal with an entirely different theory of guilt—which is tantamount to a trial without a Jury; and by the Circuit Court's refusal to clarify and decide the sufficiency of the Government's proof with respect to this concededly separate and distinct conspiracy.

B. *The Trial Judge's Conduct Throughout the Course of the Trial and the United States Attorney's Prejudicial Comments.*

The Court has recently said that the guaranty of due process is not formulated in a set of hard and fast rules but that "Asserted denial is to be decided by an appraisal of the totality of facts in a given case." (*Betts* v. *Brady*, 316 U. S. 455, 462.) Despite the standard recognized by this Court, the record in this case discloses a conviction which was the result of a trial conducted in a manner highly prejudicial to the fundamental guarantees which underlie our judicial system.

Throughout the trial lasting a number of days, the District Judge was quite evidently convinced of the guilt of the accused and took no pains to avoid disclosure of this fact to the Jury. In his examination and cross-examination of witnesses, in remarks in the presence of the Jury, in opinions expressed as to other elements of testimony and the frequent reiteration of certain questions, the trial Judge departed from that attitude of disinterestedness which is regarded as the very foundation of a fair and impartial trial. This petition would be unnecessarily lengthened by quotations from the record of the Trial Judge's animatedly prejudicial conduct.

For instances where the Trial Judge ridiculed the defense counsel, failed to accord them the respect to which they were entitled as members of the Bar, and implicitly threatened them with contempt, pre-disposing the Jury unfavorably toward the petitioners, see: R. 54, 79-80, 89, 232, 109-110, 247-249, 356, 378, 540-541, 505, 556-557, 570-571.

There are many instances in the record where the Trial Court manifested an apparent desire to assist the prosecution and to put into the mouths of the witnesses words which were unfavorable to the petitioner's case. Examples of this appear at R. 274-275, 314, 347, 354-355, 442, 443, 491, 268-269.

The Court's insistent efforts to connect the defendants in a conspiracy, its frequent and unnecessary interruptions of both direct and cross-examinations that were being competently conducted, all conveyed to the jury the impression that the Court was insisting upon a conviction. See R. 338, 460, 496, 165, 169, 160-162, 164, 167, 168, 170, 171, 172-173, 174, 259, 270-1, 311, 343-4, 346, 362, 363, 374, 375, 379, 448, 455, 457, 471, 478, 535, 536, 546, 547, 552-3 and 565.

The Court, in many instances failed to safeguard the rights of the defendants, by ignoring the objections made

by counsel and failing to rule on the propriety of the questions asked by the United States Attorney. See R. 203, 206, 455-456.

The unfavorable impression undoubtedly left upon the jury by the Court's obvious prejudice was intensified by the United States Attorney's indulgence in bits of sarcasm, as to which the Court neglected to reprimand him as it never failed to do in the case of defense counsel. See R. 353-7, 206, 247, 535.

In his summation, the United States Attorney made some comment, which is not revealed in the record, upon the fact that some of the defendants produced evidence of good reputation, *whereas others, including these petitioners* did not. Upon objections being made the following colloquy took place (R. 777-778):

> "Mr. Butler: I hate at this time to interrupt Mr. Cannella, but that is the third time he has talked about the obligations of the defense.
>
> The Court: He did not say there is any obligation. There is not any obligation.
>
> Mr. Butler: He insinuated that we should produce character witnesses.
>
> The Court: Oh, no, not at all.
>
> Mr. Butler: That is the third time, your Honor, he said it, and I think you should instruct the jury that we are under no obligation to produce any witnesses whatsoever.
>
> The Court: No; but when you put in a defense you can call character witnesses if you wish. You are not obligated. Of course not.
>
> Mr. Butler: Your Honor knows that no one can comment on the failure to put in defense.
>
> The Court: No one is commenting on the failure to put in a defense. He is referring to these defendants who took the stand only, and those are the only ones he is referring to.

Mr. Butler: He specifically referred to it. He said one defendant produced a character witness and the others did not.

The Court: There was no reference to any defendant who did not take the stand.

Mr. Butler: Your Honor, may I read for the record exactly——

The Court: There has been no reference to any defendants who did not take the stand.

Mr. Butler: May I read his exact words?

The Court: Do not interrupt. You can refer to it later.

Mr. Butler: He said the only character witness called——

The Court: Do not interrupt. You may reserve that for later."

It is quite evident that the Court completely misunderstood the point being made by counsel. The least that the Trial Judge could have done was to instruct the jury with respect to the legal presumption of innocence enjoyed by each of the defendants, and that their failure to produce evidence in proof of their good character in no way reflected upon their guilt.

It is respectfully submitted that the United States Attorney's comment was highly prejudicial, and that the Court's failure to eradicate the unfavorable impression created on the jury not only by the United States Attorney's remarks but by the Court's supporting them was error.

Petitioners base this application and the proposed appeal to this Court upon the vehement contention that the prosecutor, assisted and encouraged by the trial judge conducted the entire proceeding in a manner designed to and resulting in a mandate to the jury to convict these petitioners, all in violation of petitioners' right to a fair trial

under the Due Process Clause of the Fifth Amendment to the Constitution.

Conclusion.

It is respectfully submitted that the questions raised in this case are of sufficient importance to request this Court to issue a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review its decision made herein.

CHARLES B. HALLEY,
Counsel for Petitioners.

APPENDIX A.

Judicial Code of the United States, Title 28 U. S. Code, Section 347, Subdivision a (Judicial Code, Section 240a as Amended).

In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

APPENDIX B.

Constitution of the United States, Amendment V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation.

APPENDIX C.

Chapter 28, U. S. C. A., Section 391.

All United States Courts shall have power to grant new trials in cases where there has been a trial by jury, for reasons which new trials have usually been granted in the Courts of law. On the hearing of an appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the Court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties.

APPENDIX D.

Title 26, U. S. Code, Section 2551a.

§2551. *Exemptions*—(a) *Preparations of limited narcotic content.*

The provisions of this subchapter and part V of subchapter A of chapter 27 shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce; or to liniments, ointments, or other preparations which are prepared for external use, only, except liniments, ointments, and other preparations which contain cocaine or any of its salts or alpha or beta eucaine or any of their salts or any syn-

thetic substitute for them: Provided, That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this subchapter and said part V: Provided further, That any manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies mentioned in this section lawfully entitled to manufacture, produce, compound, or vend such preparations and remedies, shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Secretary shall direct.

Such record shall be preserved for a period of two years in such a way as to be readily accessible to inspection by any officer, agent or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officers named in section 2556, and every such person so possessing or disposing of such preparations and remedies shall register as required in section 3221 and, if he is not paying a tax under section 3220, he shall pay a special tax of $1 for each year, or fractional part thereof, in which he is engaged in such occupation, to the collector of the district in which he carries on such occupation as provided in part V of subchapter A of chapter 27.

FILED
AUG 24 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 283

CHARLES LONDONER,

Petitioner and Appellant below,

against

UNITED STATES OF AMERICA,

Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

ABRAHAM S. ROBINSON,
Counsel for Petitioner.

INDEX

PETITION

PAGE

Summary Statement of the Matter Involved 1

Questions Presented 2

Jurisdiction 6

Reasons Relied Upon for the Allowance of the Writ 6

BRIEF

Opinion of the Courts Below 9

Jurisdiction 9

Statement of the Case 10

Specification of Errors 10

Statutes and Regulations Involved 11

Summary of Argument 11

Argument 12

I—There was a misjoinder of several, separate and distinct conspiracies, a fatal variance in the proof and an attempt upon appeal to sustain the conviction upon a theory upon which the case was not tried 12

II—Mere knowledge or suspicion of knowledge by a manufacturer as to contemplated illegal use of the subject of sale by a buyer or consumer does not make him a conspirator with such buyer 15

III—The Trial Court was unfair and its charge was wholly inadequate 18

IV—Proof of the commission of the substantive offense does not warrant conviction for conspiracy 20

Conclusion 21

Appendix 23

CASES CITED

PAGE

Adler v. U. S., 182 Fed. 464 19

Barnett, In re, 124 Fed. (2d) 1005 20
Berger v. U. S., 295 U. S. 78 15
Brasfield v. U. S., 272 U. S. 448 20
Bruno v. U. S., 308 U. S. 287 ..... 14, 21

Christian v. B. M. R.R., 109 Fed. (2d) 103 20
Crawford v. U. S., 212 U. S. 183 20

De Jianne v. U. S., 282 Fed. 737 19

Eckert v. U. S., 7 Fed. (2d) 257 17

Falcone v. U. S., 311 U. S. 205 ..... 6, 15, 16, 17
Fort Dodge Hotel Co. v. Bartelt, 119 Fed. (2d) 253 ..... 14, 21
Frantz v. U. S., 62 Fed (2d) 737 19

Keliher v. U. S., 193 Fed. 8 19
Kreiner v. U. S., 11 Fed. (2d) 722 18

Linde v. U. S., 8 Cir., 13 Fed. (2d) 59 ..... 17, 20

Marcante v. U. S., 49 Fed. (2d) 156 15
Mattox v. U. S., 146 U. S. 140 20
McCandless v. U. S., 298 U. S. 342 ..... 6, 14, 21
Meadows v. U. S., 82 Fed. (2d) 881 20
Moore v. U. S., 224 Fed. 95 19
Morrison v. Calif., 291 U. S. 82 15

N. Y. C. R. Co. v. Johnson, 279 U. S. 310 20

Owen v. Owen, 22 Iowa 270 18

PAGE

People v. Becker, 210 N. Y. 274 18
People v. Odell, 230 N. Y. 481 18

Schilling v. Delaware & N. R. Corp., 114 Fed. (2d) 69 20

Tellman v. U. S., 67 Fed. (2d) 716 15
Terry v. U. S., 7 Fed. (2d) 28 15

U. S. v. Atkinson, 297 U. S. 157 20
U. S. v. Crimmins, C. C. A. 2d, 123 Fed. (2d) 271 ..... 17, 20
U. S. v. Dickerson, 18 Fed. (2d) 887 15
U. S. v. Dietrich, 126 Fed. Rep. 664 20
U. S. v. Groves, 122 Fed. (2d) 87 15
U. S. v. Koch, 113 Fed. (2d) 982 ..... 15, 17
U. S. v. Lotsch, 102 Fed. (2d) 35 .....
U. S. v. McConnell, 285 Fed. 164 15
U. S. v. N. Y. Cent. & H. R. R. Co., 146 Fed. Rep. 298 20
U. S. v. Peoni, 100 Fed. (2d) 401 ..... 15, 17
U. S. v. Quick, 128 Fed. (2d) 832 18
U. S. v. Sager, 49 Fed. (2d) 725, C. C. A. 2d 20
U. S. v. Silva, 109 Fed. (2d) 531 15
U. S. v. St. Pierre, 132 Fed. (2d) 837 21
U. S. v. Wills, 36 Fed. (2d) 855 15
U. S. v. Zeuli, unreported C. C. A. 2d, decided Aug. 2, 1943 ..... 16, 20

Van Gorder v. U. S., 21 Fed. (2d) 939 20

Wiborg v. U. S., 163 U. S. 632 20
Wilmington Mining v. Fulton, 205 U. S. 60 20
Wyatt v. U. S., 23 Fed. (2d) 791 15
Young v. U. S., 48 Fed. (2d) 26 ..... 15, 17

STATUTES AND REGULATIONS CITED

PAGE

Judicial Code:

Sections 240(a) and (c) as amended, 28 U. S. C. Section 347 6

United States Code:

Title 18, Section 88 23
Title 26, Section 2550(a) 23
Title 26, Section 2551(a) 23
Title 26, Section 2553 24
Title 26, Section 2554(a) (c)(2) (d) (f) and (g) 25, 26
Title 26, Section 2557(b)(1) (2) 26
Title 26, Section 3220(a) (b) (c) (e) and (f) 27, 28
Title 26, Section 3221(a) 28
Title 26, Section 3224(a) (b) and (c) 28, 29
Title 28, Section 391 19

Treasury Regulations No. 5 (1938) as follows:

Article 3 29
Article 15 29
Article 25 29
Article 62 29
Article 90(5) 30
Article 167 30
Article 182 31
Article 183 31
Article 185 31
Article 201 32

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No.

CHARLES LONDONER,
Petitioner and Appellant below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Supreme Court of the United States:

The petition of Charles Londoner respectfully shows:

I

Summary Statement of the Matter Involved

Petitioner, Charles Londoner, was convicted by a jury after trial in the United States District Court for the Southern District of New York upon an indictment (R. 4-11) charging him, together with nineteen other defendants, with a conspiracy to violate the Internal Revenue Laws in respect of illegal trafficking in narcotics. (The statutory provisions relevant to the indictment are set forth in the appendix, pp. 23-32 hereof.) He was sentenced to serve a term of eighteen months and to pay a $5,000 fine (R. 849).

An appeal was taken by petitioner to the Circuit Court of Appeals for the Second Circuit upon grounds enumerated in the Assignment of Errors (862-872). That Court affirmed the conviction of the petitioner, Judge Frank dissenting in a separate opinion (910-918).

Appropriate motions to dismiss the indictment and for a severance were made by this petitioner at the trial, both in the course of the Government's case as well as at the close of the entire case (R. 27-29, 322-324, 607, 767-771). By the Trial Court's ruling, made in the interests of expedition, motions made by any defendant enured to the benefit of all (R. 28, 29, 340, 600-610, 611, 757, 767, 770).

Pertinent references to the record are hereinafter made, where appropriate, in the discussion of those matters to which such references relate.

Questions Presented

1. Was it proper to join in one indictment, as a single conspiracy under one count, separate and distinct conspiracies, and to offer proof of several conspiracies which differed as to content and personnel and one of which, even assuming the sufficiency of proof, would constitute no crime?

The separate conspiracies contended by the Government to be criminal were these:

a. To make morphine synthetically (R. 19, 21);

b. To extract narcotics for illegal use from tax-exempt preparations of limited narcotic content (R. 22);

c. To divert opium (R. 23-25). Some explanation is warranted with respect to this alleged conspiracy. The Government claimed that sales of lead and opium wash, a tax-exempt preparation, would be made by

the defendant Leading Drug Company, a manufacturing chemist with which this petitioner was identified (R. 561-563), through jobbers, defendants Al N. Fox and Max Fox, who, as selling agents, would sell to retail druggists, defendants Cohen and others, who, in turn, would sell to the defendant Liss (R. 305, 330, 341, 313, 331, 349). Liss, according to the Government, would, in turn, reroute the lead and opium wash to the primary source, i. e., the manufacturing chemist, who would then similarly resell the same wash (R. 24-25). The theory was that the defendant Leading Drug Company, by showing in its return to the Government such sales, would be able to obtain additional quantities of opium used in the manufacture of lead and opium wash, which opium would then be channeled into improper uses (R. 24);

d. To sell lead and opium wash for other than medicinal purposes, and to violate regulations requiring that all dealers of such wash have a narcotic number, i. e., be registered, and further requiring the keeping of appropriate records (R. 901).

This last alleged conspiracy is one which was projected into the case for the first time by the Government in its responsive brief to the briefs of the appellants in the Court below and is the only basis upon which the Government seeks presently to sustain the conviction, although the cause was not prosecuted on any such theory (R. 901). Indeed, Judge Frank, in his dissenting opinion (R. 913), says "* * * there were in fact three distinct alleged conspiracies * * *", having reference to "a", "b" and "c" above.

This petitioner, Charles Londoner, admittedly had no connection whatever with conspiracies "a" and "b". The Circuit Court of Appeals, in the majority opinion, did not name him in connection therewith (R. 900) but did say that even had conspiracy "a" succeeded it would have constituted no crime (R. 900) and that conspiracy "b" had been

abandoned (R. 900); the Circuit Court of Appeals further admitted that conspiracy "c" had failed for want of proof (R. 901) because the vital link in the chain of alleged diversion was missing, i. e., there was a complete absence of proof that the lead and opium wash originally sold by the Leading Drug Company, with which this petitioner was identified, had ever been returned to the primary seller.

2. By reason of what has heretofore been urged under Point I, supra, may it not fairly be said that the variances between the allegations of the indictment and the proof thereof were substantial and prejudicial, hence fatal, and further because

a. The jury may have been unable to differentiate or discriminate between evidence separately applicable to some of the defendants under one or more of the separate conspiracies alleged, and cumulatively to have applied such evidence against this petitioner, notwithstanding that he was not at all named under conspiracies "a" and "b" and further notwithstanding that conspiracy "a" in any event constituted no crime, conspiracy "b" had been abandoned, conspiracy "c" had completely failed of proof, and conspiracy "d" represented a theory upon which the case had not been tried.

b. The issues were inextricably interwoven and hopelessly confused.

3. Was not the Trial Court grossly unfair in its conduct of the trial?

The conduct of the Trial Court far transcended the reasonable exercise of judicial zeal, and there was pronounced, frequent invasion of the province of trial counsel. The Trial Court manifested clear prejudice against the defendants, marked partiality for the Government and usurped the prosecutor's function by undertaking to an unwarranted degree cross-examination of defendants and

their witnesses. The Trial Court was openly contemptuous of defendants' attorneys, and his attitude reflected his partisanship. While isolated references, divorced from their context, may not fully convey the result, the cumulative effect of these references, however, project a clear picture of conduct prejudicial to the defendants to the extent of depriving them of a fair trial (R. 53, 54, 79, 80, 109, 110, 167-170, 172-174, 218, 226, 232, 234, 237-239, 245-249, 250, 259, 260, 261-275, 281, 282, 287, 288, 291, 293, 295, 296, 302, 314, 354-357, 362, 363, 377-379, 449-451, 556, 570, 571, 609-611, 672-675).

4. Did not the charge of the Court (R. 779-801), particularly in view of its conduct referred to in paragraph "3" immediately above, fail in its function in that it did not marshal any of the evidence; it failed to define, illustrate or explain the rules of law applicable to the case; it added to the confusion of the jury which already obtained; it left the jury to struggle through a morass of disconnected evidence without intelligent guidance?

5. Was not the proof insufficient to hold the petitioner under conspiracy "d" above, i. e., to sell lead and opium wash for non-medicinal purposes, since such holding would do violence to settled law that where sales are legal (as undeniably was the sale of the lead and opium wash by the firm with which petitioner was identified, through the defendants Al N. Fox and Max Fox to various retail druggists), that this petitioner could not be visited with the sins of the ultimate consumer merely because the latter might have intended a criminal use of the subject of the sale?

There was no claim here made that the petitioner had no permit to sell, or that the druggists had no permits to buy, and the Circuit Court of Appeals, in its majority opinion, conceded that the firm with which this petitioner was identified kept proper records (R. 907).

II

Jurisdiction

A

The Circuit Court of Appeals for the Second District issued its mandate herein on August 3, 1943 (R. 933).

B

Jurisdiction is here based upon the provisions of Sections 240(a) and (c) of the Judicial Code as amended, 28 U. S. C., Section 347.

C

Jurisdiction of this Court is invoked for reasons hereinafter immediately appearing.

III

Reasons Relied Upon for Allowance of the Writ Herein

The decision of the Circuit Court of Appeals, Second Circuit, is in direct conflict with the applicable law established by this Court and by various Circuit Courts of Appeal. *U. S.* v. *Falcone,* 311 U. S. 205; *McCandless* v. *U. S.,* 298 U. S. 342.

The majority opinion betrays doubt, indecision and irresolution; impliedly concedes the weakness of its reasoning but justifies its determination, despite acknowledged error in the record, in the belief entertained by a majority of the Court that some of the defendants were guilty (R. 906).

Such doubt and irresolution find further expression in the reversal by the Court below, upon a rehearing, of its original determination affirming the conviction of the defendant Rudy, and upon such rehearing dismissing the indictment as to him (R. 932).

The rules of law having application, discussed in the annexed brief, are:

1. It is error to permit the joinder in a single count of separate, several and distinct conspiracies, and to offer proof of such different alleged conspiracies where several thereof differ as to content and personnel, one of which, if proved, constitutes no crime, one of which was abandoned, one of which failed utterly of proof.

2. The reception in evidence of a considerable volume of testimony dealing with the several conspiracies, in view of the indication in paragraph "1" immediately above, of the varying nature of the said conspiracies as to content, personnel and proof, constitutes harmful variance between the indictment and proof which is intensified by the Trial Court's inadequate charge to the jury.

3. The charge to the jury by the Trial Court was obscure, confusing and provided no guidance for intelligent and discriminating judgment.

4. The Trial Court was unfair because of gross bias, partisanship and partiality in favor of the Government and against the defendants; he usurped the function of the prosecutor, invaded the province of defense counsel and unduly interfered with the conduct of the defense.

5. A seller may not be held for conspiracy to make illegal use of the subject of sale where a buyer or ultimate consumer intends illegal use thereof even where the seller may be put on notice or suspicion as to the buyer's or consumer's intended use thereof and, assuredly, the seller may not be so held where he is without such knowledge.

6. The Government may not, on appeal, cognizable of the innate weakness of the record, seek to sustain the conviction upon a theory upon which the case was not tried.

and which was first urged in the Government's brief in response to the brief of the appellants in the Circuit Court of Appeals.

7. Proof of the commission of the substantive offense will not justify an indictment for conspiracy to commit the offense.

WHEREFORE, petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, directing said Court to certify and send to this Court a full and complete transcript of the records and proceedings of the said Circuit Court had in the case numbered and entitled on its docket No. 1863, Calendar No. 223, *United States of America, Appellee,* v. *Jack Liss, Appellant,* to the end that the case may be reviewed and determined by this Court as provided by the statute of the United States; and that judgment herein of said Circuit Court of Appeals be reversed by this Court and for such other and further relief as to this Court may seem proper.

Dated, August 23, 1943.

CHARLES LONDONER,
By ABRAHAM S. ROBINSON,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No.

CHARLES LONDONER,
Petitioner and Appellant below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Courts Below

The Trial Court rendered no opinion. The opinion of the Circuit Court below (R. 899-918), rendered May 28, 1943, is still unreported.

II

Jurisdiction

Reference is respectfully had to subdivision II of the petition (p. 6, *supra*), which is herewith incorporated as an integral part hereof on the question of jurisdiction.

III

Statement of the Case

The statement of the case made in the petition herein under "I" (p. 1, *supra*) is, in the interest of brevity, incorporated herewith as an integral part hereof.

IV

Specification of Errors

A. It was error for the Court below to sustain a conviction based upon the combination in a single indictment, under a single count, of several separate and distinct conspiracies and to offer proof thereunder when such conspiracies differed as to content and personnel, one of which, even if proved, constituted no crime, one of which was abandoned, and one of which failed for complete absence of proof.

B. It was error for the Court below to sustain the conviction when the variance between the allegations of the indictment and the proof thereof was substantial and prejudicial, hence fatal, and further because

1. The jury may have applied the evidence cumulatively and without discrimination, whereas substantial parts thereof related to conspiracies with which this petitioner had not even been named and substantial portions thereof related to conspiracies which, as a matter of law, constituted no crime or in respect whereof there was a failure of proof.

2. The issues, because of the mentioned impropriety of joinder, were so inextricably interwoven as to confuse the jury.

C. It was error for the Court below to sustain the conviction because the Trial Court was grossly unfair in its conduct of the trial by reason of its manifest partisanship, demonstration of open contempt for the defendants and their counsel, usurpation of the prerogatives of counsel, unwarranted interference with the conduct of the defense, and clear exhibition of bias in favor of the Government and prejudice against the defendants.

D. It was error for the Court below to sustain the conviction because the charge of the Trial Court was obscure, confusing, failed to marshal any of the evidence and failed to provide a basis for the intelligent guidance of the jury.

E. It was error for the Court below to sustain the conviction because of the insufficiency of evidence to connect this petitioner with any of the alleged conspiracies.

F. It was error for the Court below to sustain the conviction upon a theory newly evolved upon appeal and upon which the prosecution of the cause had not proceeded.

G. It was error for the Court to sustain the conviction for a conspiracy where proof was offered as to commission of the substantive offense.

Statutes and Regulations Involved

The statutes and regulations involved are set forth in the appendix.

Summary of Argument

I. There was a misjoinder of several, separate and distinct conspiracies, a fatal variance in the proof and an attempt upon appeal to sustain the conviction upon a theory upon which the case was not tried.

II. Mere knowledge or suspicion of knowledge by a manufacturer as to contemplated illegal use of the subject of sale by a buyer does not make him a conspirator with such buyer.

III. The Trial Court was unfair and its charge was wholly inadequate.

IV. Proof of the commission of the substantive offense does not warrant conviction for a conspiracy.

ARGUMENT

I

There was a misjoinder of several, separate and distinct conspiracies, a fatal variance in the proof and an attempt upon appeal to sustain the conviction upon a theory upon which the case was not tried.

In the opening by the Government's counsel at the trial a three-pronged conspiracy was sought to be established revolving about allegedly prohibited trafficking in narcotics: 1. The synthetic making of morphine; 2. The extraction of narcotics from tax-exempt preparations; 3. The diversion of opium from permissible channels of use.

The Government conceded that this petitioner, Charles Londoner, was in nowise concerned with, and was not even named in connection with, the first two phases, i. e., "synthesis" and "extraction" (R. 24). The majority opinion of the Circuit Court of Appeals conceded that "synthesis" would, in any event, have constituted no crime (R. 900) and that "extraction" had been abandoned (R. 900). The opinion further conceded that because of the absence of a vital link in the chain of evidence, in that there was no showing whatever that the lead and opium wash sold by the Leading Drug Company, with which this petitioner

was identified (R. 561-563), had ever been returned to the primary seller, that the third phase of the alleged conspiracy (i. e., "diversion") had failed of proof (R. 901).

The conviction, therefore, of this petitioner was sought to be sustained upon, in effect, a new conspiracy which had not even been touched upon in the Government's opening at trial and upon which theory the trial had not been prosecuted, i. e., that this petitioner, with others, had conspired to subject lead and opium wash to non-medicinal use. That such theory was of novel impression so far as the appeal below was concerned is apparent from the majority opinion itself (R. 901). This was a challenge which petitioner was never called upon to meet at the trial, but one which was raised by the Government for the first time in its responsive brief to that of the appellants in the Circuit Court of Appeals when the innate weakness of the record, as providing a basis for sustaining conviction on any of the first three mentioned conspiracies, became manifest. Indeed, Judge Frank, in his dissenting opinion (R. 913), says: "* * * when, as the evidence disclosed, there were in fact three distinct alleged conspiracies * * * *", referring to the three hereinabove mentioned.

No reference to this new theory is contained either in the Government's opening, the trial or the Judge's charge. Neither the prosecution nor the Trial Court took cognizance whatever of this theory, and yet we are asked to assume that despite the absence of reference thereto in the charge, that the jury unwittingly and by some prescience, with which neither Court, prosecutor nor counsel was endowed, stumbled upon the correct basis for conviction.

In view of the foregoing, the improper joinder of the several, separate and distinct conspiracies into a single count, and the offer of proof thereunder, was particularly fraught with prejudice. The jury could hardly be expected, particularly where the charge of the Court was obscure, confusing, failed to marshal the evidence or to discuss

the rules of law applicable thereto, to determine with nicety and precision the exact point at which one conspirator withdrew, another entered, the overt act which would bind the one committing the same as well as the others who had not withdrawn, the abandonment or termination of one conspiracy and the commencement of another, particularly when some twenty defendants were involved, the trial was protracted, and the alleged conspiracies differed as to content and personnel.

The variance was conceded by the majority opinion (R. 902). The danger of joinder where, as the majority opinion acknowledged, the conspiracies were "separate not only in personnel but in content" (R. 902), is clearly recognized by the majority of the Court below (R. 902), yet a rule of expediency was adopted by a majority of the Court (R. 904), strongly challenged, however, in the dissenting opinion throughout its text. The case of *McCandless* v. *U. S.* (8th Cir.), 298 U. S. 342, is at variance with the view of the Court below on this point.

See also:

Bruno v. *U. S.*, 308 U. S. 287.
Ft. Dodge Hotel v. *Bartlett*, 119 Fed. (2d) 253.

The majority of the Circuit Court of Appeals betrayed confusion of their own, for notwithstanding the affirmance of the conviction as to the appellant Rudy, upon a rehearing by that appellant the affirmance of his conviction was rescinded, his conviction was reversed and his indictment dismissed (R. 932).

Certainly the force of the declaration of the dissenting opinion, touching upon the impropriety of the joinder in the case at bar, was, in the light of the preceding observations, fully warranted: "My colleagues' ruling here is the farthest north of the McElroy case to be found in the books" (R. 916).

These cases support this petitioner's contention that joinder in this case was fatal:

Berger v. *U. S.*, 295 U. S. 78.
Marcante v. *U. S.*, 49 Fed. (2d) 156.
U. S. v. *Wills*, 36 Fed. (2d) 855.
Tellman v. *U. S.*, 67 Fed. (2d) 716.
U. S. v. *Groves*, 122 Fed. (2d) 87.
U. S. v. *Silva*, 109 Fed. (2d) 531.
Wyatt v. *U. S.*, 23 Fed. (2d) 791.
Terry v. *U. S.*, 7 Fed. (2d) 28.
U. S. v. *McConnell*, 285 Fed. 164.

II

Mere knowledge or suspicion of knowledge by a manufacturer as to contemplated illegal use of the subject of sale by a buyer or consumer does not make him a conspirator with such buyer.

It is settled law that the seller and buyer cannot be indicted for conspiracy to subject the commodity sold to illegal use unless the seller not only joins in such illegal use but has a definite stake therein:

Falcone v. *U. S.*, 311 U. S. 205.
U. S. v. *Peoni*, 100 Fed. (2d) 401.
U. S. v. *Koch*, 113 Fed. (2d) 982.
Young v. *U. S.*, 48 Fed. (2d) 26.
U. S. v. *Dickerson*, 18 Fed. (2d) 887.
Morrison v. *Calif.*, 291 U. S. 82.

The landmark of those decisions is *Falcone* v. *U. S.*, 311 U. S. 205. The majority opinion of the Court below is sought to be distinguished from the *Falcone* case, upon rather narrow grounds, with respect to the druggists (R. 909). This petitioner was not a druggist. The firm with

which he was identified was a manufacturing chemist (R. 899). The Circuit Court of Appeals sought to sustain the conviction of this petitioner, when all the other grounds failed, upon the theory that he had conspired to sell lead and opium wash for non-medicinal purposes to other than registered dealers. There is no claim that this petitioner sold to others than registered dealers and the majority opinion below concedes that he kept proper records (R. 907). There is, therefore, no basis for the lower Court's conclusion with respect to this petitioner.

The petitioner's sales, or rather those of the firm with which he was identified, were legal. If, therefore, petitioner is sought to be held it must be upon a theory which would hold him chargeable, together with the buyer, because of the latter's allegedly criminal resale. The firm with which petitioner was connected was a manufacturing chemist. The *Falcone* case, *supra,* held that the seller could not be joined in a conspiracy with the manufacturer. If it is indeed illegal for a retail druggist to sell lead and opium wash to a consumer for non-medicinal use, how can the manufacturing chemist, who, through a jobber, sold the retail druggist, be joined in a conspiracy with the druggist to resell it merely because the druggist intended a criminal resale?

However viewed, the majority opinion below resolves itself into an essential holding that mere quantity sales permits of an inference of impropriety of intended use of the commodity when resold, a holding directly at variance with the Falcone decision. Despite the seeming departure of the Circuit Court of Appeals from the Falcone holding, the Court nevertheless enunciated its readherence thereto in its opinion in the case of *United States* v. *Zeuli,* unreported, but decided August 2, 1943, which was cited in the per curiam opinion upon the Court's reversal of its own judgment of conviction of the defendant Rudy upon the latter's application for rehearing (R. 932).

Retail druggists, who, through wholesalers or jobbers had been buying "a general line of pharmaceuticals from the Leading Drug Company (this petitioner's principal) for many years" inclusive of lead and opium wash (R. 169, 170, 173, 180, 261, 297, 303), purchased such wash through defendants Al N. Fox and Max Fox, drug jobbers, who placed the orders with the Leading Drug Company. Knowledge of the ultimate destination of the wash through resale by druggists to consumers could hardly be imputed to this petitioner, but even were there such knowledge it would be insufficient (see *Falcone* v. *U. S.*, 311 U. S. 205; *U. S.* v. *Peoni*, 2 Cir., 100 Fed. (2d) 401; *Linde* v. *U. S.*, 8 Cir., 13 Fed. (2d) 59 at p. 61; *U. S.* v. *Koch*, C. C. A. 2d, 113 Fed. (2d) 982, at p. 983; *Eckert* v. *U. S.*, C. C. A. 8th, 7 F. (2d) 257 at p. 258; *U. S.* v. *Crimmins*, C. C. A. 2d, 123 F. (2d) 271 at p. 272).

The brevity and peculiar pertinence of language from the case of *Young* v. *U. S.*, C. C. A. 5th, 48 Fed. (2d) 26, warrants quotation of the excerpt verbatim:

> "We are of opinion that this evidence was insufficient to prove the conspiracy alleged. McDaniel, the seller, could not have been a co-conspirator with Young and Coates, the purchasers, upon proof simply that he made sales to them; and in turn Young and Coates, whether acting individually or as partners, could not upon similar proof have been co-conspirators with those who purchased from them at retail. There must have been a conspiracy to do something unlawful after the sales were made in order to sustain the indictments * * *.
>
> There is no similar proof here, but the evidence stops with the sales. The conviction of the sellers cannot be sustained on the ground that they had knowledge of the intention of the purchasers to use the sugar and other articles in connection with the unlawful manufacture of liquor."

III

The Trial Court was unfair and its charge was wholly inadequate.

The joinder of several separate and distinct conspiracies differing as to content and personnel, the twenty defendants, the protracted nature of the trial, rendered the case complex. The majority opinion of the Court below states it well (R. 905 of opinion).

> "The charge did not tell the jury that these were the issues for them to decide; the judge merely read them the relevant sections from the statute and the regulations; and the wilderness of the resulting verbiage must have left them pretty much in the dark."

The charge (R. 779-801) was inadequate and hopelessly confusing. The evidence was not marshaled; no illustration of applicable rules of law was given. Far from clarifying existing confusion and providing intelligent guidance and discriminating judgment, the charge merely added to the welter of confusion and the jury were rendered utterly impotent to cope with the morass of testimony and evidence which had been thrown into the judicial hopper throughout a protracted conspiracy trial.

Such charge, particularly when considered with relation to the improper joinder, the variances, and the unfavorable conduct of the trial judge heretofore considered, assuredly deprived this petitioner of a fair trial (see *People* v. *Odell,* 230 N. Y. 481, 487-488; *Kreiner* v. *U. S.,* 11 Fed. (2d) 722, 731; *Owen* v. *Owen,* 22 Iowa 270; *U. S.* v. *Quick,* 128 Fed. (2d) 832, 835; *People* v. *Becker,* 210 N. Y. 274 at p. 307).

As Judge Frank in his dissenting opinion observed (R. 913):

> "In those circumstances, the least that the trial judge should have done was to aid the jury in his charge by differentiating the conspiracies. Not only did he not do so, but as my colleagues point out, his charge was not too enlightening."

The Trial Court had refused to accept written requests to charge (R. 779, 803-804). This may have accounted for the failure of the appellants to challenge, by making appropriate exceptions, the inadequacies of the Court's charge as given. Notwithstanding this the interests of justice require, in a proper case, that the charge be reviewed. The review of the charge may be urged under Title 28, United States Code, Section 391, which provides as follows:

> "All United States Courts shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the Courts of law. On the hearing of an appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the Court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties."

See also:

De Jianne v. *U. S.*, 282 Fed. 737.
Moore v. *U. S.*, 224 Fed. 95.
Keliher v. *U. S.*, 193 Fed. 8.

The unfairness of the Trial Court's conduct has been heretofore considered (pp. 4-5, *supra*) (see *Adler* v. *U. S.*, 182 Fed. 464, 472-473; *Frantz* v. *U. S.*, 62 Fed. (2d) 737).

IV

Proof of the commission of the substantive offense does not warrant conviction for conspiracy.

Proof of the commission of the substantive offense will not sustain a conviction for a conspiracy to commit such offense.

U. S. v. *Crimmins, C. C. A.* 2d, 123 Fed. (2d) 271 at p. 272.
Linde v. *U. S.*, 8 Cir., 13 Fed. (2d) 59 at p. 61.
U. S. v. *Zeuli,* C. C. A. 2d, unreported, decided August 2, 1943.
U. S. v. *Dietrich,* 126 Fed. Rep. 664.
U. S. v. *New York Central & H. R. R. Co.,* 146 Fed. Rep. 298.
U. S. v. *Sager,* 49 Fed. (2d) 725, 727, 728 (C. C. A. 2d).

The dissenting opinion of the Court below in great degree epitomizes the viewpoint of this petitioner. Reference is therefore had to the text of such opinion as well as to these cases cited in such dissent.

Mattox v. *U. S.*, 146 U. S. 140.
Wilmington Mining v. *Fulton,* 205 U. S. 60.
Schilling v. *Delaware & N. R. Corp.,* 114 Fed. (2d) 69.
Christian v. *B. M. R. R.,* 109 Fed. (2d) 103, 105.
Wiborg v. *U. S.*, 163 U. S. 632, 658.
U. S. v. *Atkinson,* 297 U. S. 157, 160.
Brasfield v. *U. S.*, 272 U. S. 448.
N. Y. C. R. Co. v. *Johnson,* 279 U. S. 310, 318.
Crawford v. *U. S.*, 212 U. S. 183, 194.
Van Gorder v. *U. S.*, 21 Fed. (2d) 939, 942.
Meadows v. *U. S.*, 82 Fed. (2d) 881, 884.
In re Barnett, 124 Fed. (2d) 1005.

U. S. v. *St. Pierre,* 132 Fed. (2d) 837, 849.
Bruno v. *U. S.,* 308 U. S. 287, 294.
Fort Dodge Hotel Co. v. *Bartelt,* 119 Fed. (2d) 253, 259.
McCandless v. *U. S.,* 298 U. S. 342, 347, 348.

CONCLUSION

In conclusion it is respectfully submitted that the questions involved herein have been demonstrated to be of sufficient importance to warrant the issuance by this Court of a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review its decision herein.

Respectfully submitted,

ABRAHAM S. ROBINSON,
Counsel for Petitioner.

APPENDIX

STATUTES

TITLE 18—UNITED STATES CODE

§88. (*Criminal Code, Section 37.*) *Conspiring to commit offense against United States.*—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

TITLE 26—UNITED STATES CODE (INTERNAL REVENUE CODE)

SUBCHAPTER A.—OPIUM AND COCA LEAVES

§2550. *Tax*—(a) *Rate.*

There shall be levied, assessed, collected, and paid upon opium, coca leaves, any compound salt, derivative, or preparation thereof, produced in or imported into the United States, and sold, or removed for consumption or sale, an internal revenue tax at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce. The tax imposed by this subsection shall be in addition to any import duty imposed on the aforesaid drugs.

§2551. *Exemptions*—(a) *Preparations of limited narcotic content.*

The provisions of this subchapter and part V of subchapter A of chapter 27 shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium, or more than

one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce; or to liniments, ointments, or other preparations which are prepared for external use, only, except liniments, ointments, and other preparations which contain cocaine or any of its salts or alpha or beta eucaine or any of their salts or any synthetic substituted for them: Provided, That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this sub-chapter and said Part V: Provided further, That any manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies mentioned in this section lawfully entitled to manufacture, produce, compound, or vend such preparations and remedies, shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Secretary shall direct.

Such record shall be preserved for a period of two years in such a way as to be readily accessible to inspection by any officer, agent or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officers named in section 2556, and every such person so possessing or disposing of such preparations and remedies shall register as required in section 3221 and, if he is not paying a tax under section 3220, he shall pay a special tax of $1 for each year, or fractional part thereof, in which he is engaged in such occupation, to the collector of the district in which he carries on such occupation as provided in part V of subchapter A of chapter 27.

§2553. *Packages*—(a) *General requirement.* It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original

stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

§2554. *Order forms*—(a) *General requirement.* It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

(c) (2) *Prescriptions.*

To the sale, dispensing, or distribution of any of the drugs mentioned in section 2550 (a) by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under section 3221: *Provided, however,* That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: *And provided further,* That such dealer shall preserve such description for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials mentioned in section 2556.

(d) *Preservation.* Every person who shall accept any order required under subsection (a), and in pursuance thereof shall sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a), shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent,

or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section 2556.

(f) *Supply.* The Secretary shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors for sale by them to those persons who shall have registered and paid the special tax as required by sections 3221 and 3220 in their districts, respectively; * * *.

(g) *Unlawful use.* It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession. §2557.

* * * * * * *

(b) *Violations in general.*

(1) Any person who violates or fails to comply with any of the requirements of this subchapter or part V of subchapter A of chapter 27, shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court.

(2) Any person required under this subchapter or section 3220 to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter or section 3220, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

§3220. *Tax.*

On or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall pay the special taxes hereinafter provided. Every person upon first engaging in any of such activities shall immediately pay the proportionate part of the tax for the period ending on the following June 30.

(a) *Importers, manufacturers, or producers.*

Importers, manufacturers, producers, or compounders, lawfuly entitled to import, manufacture, produce, or compound any of the aforesaid drugs, $24 per annum;

(b) *Wholesale dealers.*

Wholesale dealers, lawfully entitled to sell and deal in any of the aforesaid drugs, $12 per annum;

(c) *Retail dealers.*

Retail dealers, lawfully entitled to sell and deal in any of the aforesaid drugs, $3 per annum;

(e) *Persons engaged in research, instruction, or analysis.*

Persons not registered as an importer, manufacturer, producer, or compounder and lawfully entitled to obtain and use in a laboratory any of the aforesaid drugs for the purpose of research, instruction, or analysis shall pay $1 per annum, but such persons shall keep such special records relating to receipt, disposal, and stocks on hand of the aforesaid drugs as the Commissioner of Narcotics, with the approval of the Secretary, may by regulation require. Such special records shall be open at all times to the inspection of any duly authorized officer, employee, or agent of the Treasury Department.

(f) *Persons not otherwise taxed.*

For a tax of $1 a year on persons not otherwise taxed, dispensing preparations and remedies of limited narcotic content, see section 2551 (a).

§3221. *Registration*—(a) *Requirements.*

On or before July 1 of each year every person who engages in any of the activities enumerated in section 3220 shall register with the collector of the district his name or style, place of business and place or places where such business is to be carried on, and every person upon first engaging in any such activities shall immediately make like registration.

§3224. *Unlawful acts in case of failure to register and pay special tax*—(a) *Trafficking.*

It shall be unlawful for any person required to register under the provisions of this part or section 2551 (a) to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this part, or section 2551 (a).

(b) *Transportation.*

It shall be unlawful for any person who shall not have registered and paid the special tax as required by sections 3220 and 3221 to send, ship, carry, or deliver any of the aforesaid drugs from any State or Territory or the District of Columbia, * * *.

(c) *Possession.*

It shall be unlawful for any person who has not registered and paid the special tax as provided for by this part or section 2551 (a), to have in his possession or under his control any of the aforesaid drugs; and such possession

or control shall be presumptive evidence of a violation of this subsection and subsection (a), and also a violation of the provisions of sections 3220 and 3221 * * *.

REGULATIONS

(Treasury Regulations No. 5 [1938], relating to the "Importation, Manufacture, Production, Compounding, Sale, Dealing in, Dispensing and Giving Away of Opium or Coca Leaves or any Compound, Manufacture, Salt Derivative, or Preparation thereof.")

* * * * * * *

Art. 3. *Persons liable.*—Liability to payment of special tax and registration attaches to every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, administers, or gives away narcotics. As to the tax rates applicable to a person engaged in one or more of the foregoing activities see Article 13.

* * * * * * *

Art. 15. *Manufacturers and compounders.*—As a general rule, every person who, by compounding, mixing, or other process of manufacture, produces narcotic drugs or preparations for sale or distribution is subject to tax as a manufacturer or compounder at $24 per annum in Class I, with the following exceptions as to retail dealers:

* * * * * * *

Art. 25. *Partnerships.*—A partnership is subject to the same tax liability as an individual. Should either of the partners also individually engage in a taxable activity, he will incur additional liability with respect to such activity.

* * * * * * *

Art. 62. *Written order required.*—Except as otherwise provided, order forms are required for all sales or other dispositions of narcotic drugs.

* * * * * * *

Art. 90. *When not required.*—The use of order forms is not required:

* * * * * *

(5) For the sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than 2 grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than 1 grain of codeine, or any salt or derivative of any of them in 1 fluid ounce, or, if a solid, or semisolid preparation, in 1 avoirdupois ounce or of liniments, ointments, or other preparations which are prepared for external use only, except liniments, ointments, and other preparations which contain cocaine, or any of its salts or alpha or beta eucaine or any of their salts or any synthetic substitute for them, provided that such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this Act and that a record of dispositions is kept as required by Article 185.

* * * * * *

Art. 167. *Purpose of issue.*—A prescription, in order to be effective in legalizing the possession of unstamped narcotic drugs and eliminating the necessity for use of order forms, must be issued for legitimate medical purposes. The responsibility for the proper prescribing and dispensing of narcotic drugs is upon the practitioner, but a corresponding liability rests with the druggist who fills the prescription. An order purporting to be a prescription issued to an addict or habitual user of narcotics, not in the course of professional treatment but for the purpose of providing the user with narcotics sufficient to keep him comfortable by maintaining his customary use, is not a prescription within the meaning and intent of the act; and the person filling such an order, as well as the person issuing it, may be charged with violation of the law.

* * * * * *

Art. 182. *Restrictions on dispositions.*—A preparation conforming to the standards set out in Article 181 is exempt from stamp tax and the requirements pertaining to taxable narcotics only when manufactured, sold, distributed, given away, dispensed, or possessed as a medicine. A manufacturer may produce and sell as exempt only preparations readily capable of use for claimed medicinal purposes, and sales thereof, if not to consumers, shall be made only to persons registered in Class V. Sales made to consumers, either by manufacturers or dealers shall be made only in such quantities and with such frequency to the same purchaser as will restrict their use to the medicinal purpose for which intended.

* * * * * *

Art. 183. *Dispositions to dealers.*—Orders for exempt preparations except where sold to a registrant in Class VI are not required to be on any particular forms, but an order from a dealer shall not be honored by a manufacturer or other dealer unless it bears the registry number of the dealer giving the order.

* * * * * *

Art. 185. *Records required.*—Every manufacturer, producer, compounder, or vendor (including dispensing physicians), of exempt preparations shall record all sales, exchanges, gifts, or other dispositions, the entries to be made at the time of delivery. Separate records shall be kept of dispositions to registrants and of dispositions to consumers. The record of dispositions to registrants shall show the name, address, and registry number of the registrant to whom disposed, the name and quantity of the preparation, and the date upon which delivery to the registrant, his agent or a carrier is made. The record of dispositions to consumers shall show the name of the recipient, his address, the name and quantity of the preparation, and the date of delivery.

Art. 201. *Records open to inspection.*—Any officer, agent, or employee of the Treasury Department * * * authorized to enforce the act, * * * shall have authority to examine the books, papers, and records kept pursuant to these regulations, and may require the production thereof.

All order forms, duplicate forms, prescription records, returns, and inventories required under the act or these regulations to be kept on file shall be kept so that they can be readily inspected.

* * * * * * *

(14)

Office - Supreme Court, U. S.
FILED
AUG 24 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 284

I. DAVID COHEN and HUEL'S CHEMISTS, INC.,
Petitioners and Appellants below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

SAUL M. MEADOW and BENJAMIN JAFFE,
Counsel for Petitioners.

INDEX

PAGE

PETITION

Summary Statement of the Matter Involved 1
Jurisdiction to Review 4
Questions Presented 4
Reasons Relied on for Allowance of the Writ 6

BRIEF

Opinion of the Courts Below 8
Jurisdiction 8
Statement of the Case 9
Constitution and Statutes Involved: The Sixth Amendment to the Constitution of the United States 9
Specification of Errors 9

POINT I—There was a fatal misjoinder of conspiracies and defendants and a variance between the allegations of the indictment and the proof 10

POINT II—The motion made by the defendants-appellants I. David Cohen and Huel's Chemists, Inc. to dismiss the indictment at the close of the Government's case and again at the close of all the evidence and to direct a verdict of acquittal should have been granted 11

POINT III—To purchase an exempt preparation from a retailer is not a crime, hence the appellants I. David Cohen and Huel's Chemists, Inc. cannot be guilty of a conspiracy for said sale 14

POINT IV—Appellants I. David Cohen and Huel's Chemists, Inc. were not accorded a fair and impartial trial as required by the Sixth Amendment of the Constitution 15

CONCLUSION 18

APPENDIX 19

CASES CITED

	PAGE
Berger v. U. S., 295 U. S. 78	16
Direct Sales Co., Inc. v. U. S., 63 S. C. 1265	14
Graceffo v. U. S., 46 Fed. (2d) 852	12
Langer v. U. S., 43 Fed. (2d) 890	13
Linde v. U. S., 8 Cir., 13 Fed. (2d) 59	13
McElroy v. U. S., 164 U. S. 76	10
Marcante v. U. S., 49 Fed. (2d) 156	13
Nosowitz v. U. S., 282 Fed. 575	12
Reed v. U. S., 51 Fed. (2d) 941	12
Tellman v. U. S., 67 Fed. (2d) 716	10
Tinsley v. U. S., 43 Fed. (2d) 890	13
U. S. v. Buchalter, 88 Fed. (2d) 625	12
U. S. v. Falcone, 109 Fed. (2d) 579	13
U. S. v. Koch, 113 Fed. (2d) 982	12
U. S. v. Silva, 109 Fed. (2d) 531	10
U. S. v. Smith, 112 Fed. (2d) 83	10
U. S. v. Wills, 36 Fed. (2d) 855	10
Vannata v. U. S., 228 Fed. 424	15
Viereck v. U. S., U. S. S. Ct., Oct. Term, 1942	16
Wyatt v. U. S., 23 Fed. (2d) 791	10

STATUTES AND REGULATIONS CITED

PAGE

Supreme Court Rules (Revised, 1939), Rule 38 4

United States Code:

Title 18, Section 88 19
Title 26, Section 2550(a) 1, 19
Title 26, Section 2551(a) 1, 19
Title 26, Section 2553 ..... 1, 20
Title 26, Section 2554(a) (c)(2) (d) (f) and (g) 1, 21, 22
Title 26, Section 2557(b)(1) (2) 22
Title 26, Section 3220(a) (b) (c) (e) and (f) 1, 23, 24
Title 26, Section 3221(a) 1, 24
Title 26, Section 3224(a) (b) and (c) 1, 24, 25
Title 28, Section 347(a) (c) as Amended, Section 240(a) 4

Treasury Regulations No. 5 (1938) as follows:

Article 3 25
Article 15 25
Article 25 25
Article 62 25
Article 90(5) 26
Article 167 26
Article 182 27
Article 183 27
Article 185 27
Article 201 28

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No.

I. DAVID COHEN and HUEL'S CHEMISTS, INC.,
Petitioners and Appellants below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Supreme Court of the United States:

The petition of I. David Cohen and Huel's Chemists, Inc. respectfully shows:

1

Summary Statement of the Matter Involved

Petitioners were convicted by a jury after a trial in the United States District Court for the Southern District of New York upon an indictment (R. 10-33) charging them together with eighteen other defendants with conspiracy to violate the Internal Revenue Laws Sections 2,550(a), 2,551, 2,553, 2,554, 3,220, 3,221 and 3,224 of the Internal Revenue Code dealing with the manufacture, sale and general illegitimate use and traffic in narcotics.

Said petitioner I. David Cohen was sentenced to one year and a day and fined the sum of $1,000.00 (R. 846), and the petitioner Huel's Chemists, Inc. fined the sum of $10,000.00.

The petitioners herein appealed to the United States Circuit Court of Appeals for the Second Circuit upon various grounds fully set forth in the Assignments of Errors (R. 862-871). Upon such appeal the Circuit Court of Appeals for the Second Circuit, by a divided opinion, affirmed the conviction of these petitioners I. David Cohen and Huel's Chemists, Inc., and wrote an opinion on same.

The grounds which will be relied on in this Court, if the petition is granted, are as follows:

A. The indictment charged a conspiracy consisting of a single count. The proof submitted embraced three different conspiracies, different in personnel as well as in content, therefore there was a misjoinder which was harmful sufficient to warrant a dismissal of the indictment.

B. The evidence failed to prove the petitioners guilty of the crime as charged.

C. There was a fatal harmful variance between the allegations of the indictment and the opening of the Assistant United States Attorney and the proof subsequently submitted.

D. The Judge's charge was inadequate, unenlightening and confusing which was not sufficient to allow the jury to arrive at a result in conformity with the proof adduced at the trial and the law involved in the case.

E. The trial was unfair, depriving the petitioners of their rights guaranteed by the United States Constitution.

At the end of the Government's case and at the end of the defendants' case the petitioners herein moved to dis-

miss the indictment. It should be noted here that the Trial Judge, to conserve time, gave every defendant the benefit of every motion made by any of the other defendants (R. 28, 29, 340, 600-610, 611, 757, 767, 770).

The Government in its opening stated that three different conspiracies existed for which the defendants were on trial, the first conspiracy being to manufacture morphine synthetically, the second conspiracy being to extract narcotics for illegitimate use from tax-exempt narcotic preparations. It was conceded by the Government that the petitioners were not concerned with the first two conspiracies, although the majority of the trial was concerned solely with the aforementioned two conspiracies. The third conspiracy contended by the Government was the diversion of opium or extraction of same from exempt narcotic preparations. It was the contention of the Government that the petitioners herein were a part of this conspiracy in the following manner: Sales of lead and opium wash which is a narcotic of limited content and an exempt preparation was sold by the manufacturer (defendants Charles Londoner, Murray Palmer and Leading Drug Company) to jobbers as selling agents (defendant Fox), to retail druggists, petitioners Huel's Chemists, Inc. and I. David Cohen, who sold to individual defendant Liss. The Government's contention was that the jury inferred from these facts that defendant Liss returned the lead and opium wash to the manufacturer (the defendants Charles Londoner, Murray Palmer and Leading Drug Company). The Government further contended that in furtherance of said conspiracy the petitioner Huel's Chemists, Inc. failed to keep proper records pursuant to the regulations of the Department of Treasury of the United States in dealing with exempt narcotic preparations, and that the said exempt narcotic preparation, to wit, lead and opium wash, was not used for medicinal purposes as required under the statute.

It was conceded by the Government that the first two conspiracies failed.

The majority of the Circuit Court of Appeals affirmed the judgment of conviction of the District Court on an entirely new theory, to wit, the failure of petitioners herein to keep proper records and the selling of the exempt narcotic preparation for non-medicinal purposes.

2

Jurisdiction to Review

The United States Circuit Court of Appeals for the Second Circuit made its order for a mandate herein affirming the conviction of the petitioners I. David Cohen and Huel's Chemists, Inc. on August 3, 1943 (R. 933). The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. Code, Section 347, subdivisions a and c, and as amended by Section 240(a) under the Act of February 13, 1925, and Rule 38 of the Revised Rules (1939) of the Supreme Court of the United States. The reasons directly hereinafter further set forth constitute valid grounds for invoking the jurisdiction of this Court.

3

Questions Presented

A. Was it proper to combine in one indictment three different alleged conspiracies which were different as to personnel and one of which, if proved, would constitute no crime? The three conspiracies which the Government contended were criminal are as follows:

1. To manufacture morphine synthetically.

2. To extract narcotics for illegitimate use from tax-exempt narcotic preparation such as paragoric, lead and opium wash and Stoke's Expectorant.

3. To divert opium by means of a circulation through the various defendants of lead and opium wash so that the manufacturer could continuously use the same lead and opium wash without manufacturing same and secure the opium from the Government by falsifying its records and divert the said opium to the illegal market.

The petitioners I. David Cohen and Huel's Chemists, Inc. had no connection with conspiracies "a" and "b" (see Opinion of Circuit Court of Appeals, R. 898-919). Conspiracy "a", if successful, would not constitute a crime (see Opinion of Circuit Court of Appeals, R. 898-918). Conspiracy "c" failed utterly of proof (see Opinion of Circuit Court of Appeals, R. 898-918). The necessary vital link, to wit, to show the sales of the lead and opium wash by the defendant Liss to the defendants Charles Londoner, Murray Palmer and a leading drug company was missing.

B. Was there not a harmful and fatal variance between the allegations in the indictment and the proof as presented because of the foregoing and the following reasons:

1. The jury confused the issues as to the petitioners I. David Cohen and Huel's Chemists, Inc.

2. The jury indiscriminately and cumulatively used evidence against the petitioners, which evidence related solely to the first two conspiracies above mentioned, to which the petitioners were not parties. One of the conspiracies did not constitute a crime; therefore, it was misleading to the jury to hear a vast amount of testimony in reference to a legal transaction which appeared illegal.

C. Was the Judge's charge enlightening and direct, sufficient to aid the jury in intelligently weighing the guilt or innocence of the petitioners? Was the presentation by the Assistant United States Attorney in his opening and during the course of the trial and his summation sufficiently

clear so as to enable the jury to properly know the issues of the case?

D. Were not the petitioners herein deprived of a fair and impartial trial as required by the Sixth Amendment of the Constitution of the United States?

E. Was not the purchase by defendant Liss from petitioners I. David Cohen and Huel's Chemists, Inc. a legal transaction on the part of Liss, therefore making a conspiracy between the two impossible, inasmuch as one of the parties was engaged in a legal act?

4

Reasons Relied on for Allowance of the Writ

The decision of the Circuit Court of Appeals is in direct conflict with the established law applicable to the facts in this case.

The principles of law in so far as they apply to the case at bar are as follows:

A. It is improper to combine into one single count indictment an offer to prove three different conspiracies, one of which was a legal agreement, and two of which the Government conceded they failed to prove, wherein the personnel were separate and different.

B. Such a combination and joinder was harmful and fatal, and particularly so when the opening and closing statements of the Assistant United States Attorney were unenlightening and the Judge's charge to the jury was indirect, inadequate and unenlightening and unintelligent.

C. The petitioners were not afforded a fair and impartial trial, as required by the Sixth Amendment of the Constitution of the United States, inasmuch as the Trial Judge showed bias, the Trial Judge conducted extensive cross-examination and direct examination of all witnesses, he personally belittled all of the defendants and their counsel and directed petitioners' counsel to refrain from participating in the trial other than when the petitioners' names were mentioned.

D. Where there is a sale of a commodity which is legal for the buyer to purchase, the seller cannot be guilty of a conspiracy although he may be guilty of a substantive crime.

WHEREFORE, your petitioners pray that a Writ of Certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, directing said Court to certify and send to this Court a full and complete transcript of the records and proceedings of the said Circuit Court had in the case numbered and entitled on its docket No. 1863, Calendar No. 223, United States of America, Appellee, against Jack Liss, et al., Appellants, to the end that the case may be reviewed and determined by this Court as provided for by the Statute of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such other and further relief as to this Court may seem just and proper.

Dated, August 20, 1943.

I. DAVID COHEN and HUEL'S CHEMISTS, INC.,
By SAUL M. MEADOW and BENJAMIN JAFFE,
Counsel for Petitioners,
1450 Broadway, New York, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No.

I. DAVID COHEN and HUEL'S CHEMISTS, INC.,
Petitioners and Appellants below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1

Opinion of the Courts Below

There was no opinion rendered by the Trial Court relating to the within petitioners. The opinion of the Circuit Court below (R. 898-918), rendered on May 28, 1943, is still unreported.

2

Jurisdiction

The Court is respectfully referred to Item "2" of the petition, captioned "Jurisdiction to Review", which is herewith adopted and made a part of this brief under the question of jurisdiction.

3

Statement of the Case

Statement of the case has been made in the said petition, which is hereby adopted and made a part of this brief.

4

Constitution and Statutes Involved: The Sixth Amendment to the Constitution of the United States

The statutes and regulations involved are set forth in the appendix herein.

5

Specification of Errors

A. The Circuit Court erred in sustaining a conviction when it was improper to combine in one single count indictment and offer proof of three different conspiracies, all of which were different as to content, two of which were different as to personnel, one of which was a legal agreement, and two of which the Government failed to prove.

B. The Circuit Court erred in sustaining the conviction when there was harmful and fatal variance between the allegations and the proof and the variance between the opening statements of the Assistant United States Attorney and the proof adduced, because it tended to confuse the jury as to the issues.

C. The Circuit Court erred in sustaining the conviction because the Judge's charge was unintelligent, unenlightening and indirect, thereby preventing the jury from intelligently weighing the evidence in the case.

D. The Circuit Court erred in sustaining the conviction by the jury because the trial was unfair in that the Judge exhibited bias towards the Government and against the defendants. During the trial the Judge examined most of the Government's witnesses and cross-examined all of the defendants at length and their witnesses. He attacked the defendants and their counsel generally and evidenced to the jury his contempt for the defendants and their counsel.

E. The Circuit Court erred in sustaining the conviction because the evidence was not sufficient to connect the petitioners with the conspiracy.

POINT I

There was a fatal misjoinder of conspiracies and defendants and a variance between the allegations of the indictment and the proof.

When there is a misjoinder, as is conceded by the Circuit Court of Appeals in their opinion in this case, it reduces itself to the fact as to whether or not the misjoinder is fatal or merely harmful. There can be no question but that the misjoinder of three conspiracies here was fatal and so harmful to the petitioners herein so as to deprive them of a fair trial. Almost the entire ten days of trial was consumed with evidence by witnesses concerning the first two conspiracies which it is conceded the petitioners herein were not a part of. The cases wherein the facts were not as complicated as the case at bar, in which misjoinders were held to be fatal, are as follows:

McElroy v. *United States,* 164 U. S. 76.
Marcante v. *United States,* 49 Fed. (2nd) 156.
United States v. *Wills,* 36 Fed. (2nd) 855.
Tellman v. *United States,* 67 Fed. (2nd) 716.
United States v. *Silva,* 109 Fed. (2nd) 531.
Wyatt v. *United States,* 23 Fed. (2nd) 791.
United States v. *Smith,* 112 Fed. (2nd) 83, at page 85.

POINT II

The motion made by the defendants-appellants I. David Cohen and Huel's Chemists, Inc. to dismiss the indictment at the close of the Government's case and again at the close of all the evidence and to direct a verdict of acquittal should have been granted.

Huel's Chemists, Inc. sold a large quantity of lead and opium wash to Jack Liss, a co-defendant, at a reasonable profit of approximately 75¢ per gallon. All the sales were recorded in the books of the corporation, and the profits paid to the corporation. Appellant I. David Cohen testified at length that all the sales were made during the regular business hours of the drug store, and that large bottles of gallon goods of lead and opium wash were left conspicuously on the floor in the front portion of the store daily during these transactions, being observed by almost all of the customers of the drug store, and that all of the lead and opium wash was picked up at the store during the regular store hours and from the front portion of the store, so that all customers could observe this procedure.

There was no evidence that the appellant I. David Cohen was connected with the lead and opium wash either prior to the purchase of same by Huel's Chemists, Inc. or subsequent to the sale by Huel's Chemists, Inc. to Jack Liss.

There was absolutely no evidence that the lead and opium wash sold by Huel's Chemists, Inc. to Jack Liss was subsequently used for an unlawful purpose. It may very well be that the entire amount of the lead and opium wash purchased by Jack Liss from Huel's Chemists, Inc. is presently stored in a warehouse and in the possession of Jack Liss.

It is interesting to note that Towns & James and other leading drug jobbers who sold lead and opium wash to Huel's Chemists, Inc. in large quantities were not indicted or prosecuted in any way.

This Court said in the case of *United States* v. *Pioni*, 100 Fed. (2nd) 401, at page 403:

> "A 'conspiracy' imports a concert of purpose. * * * At times it seems to be supposed that, once some kind of criminal concert is established, all parties are liable for everything anyone of the original participants does, and even for what those do who join later. Nothing could be more untrue. Nobody is liable in conspiring except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it."

Mere suspicion is not sufficient. The Government must prove beyond a reasonable doubt that a conspiracy existed.

> *Nosowitz* v. *United States*, 282 Fed. 575.
> *Reed* v. *United States*, 51 Fed. (2nd) 941.
> *Graceffo* v. *United States*, 46 Fed. (2nd) 852.

This Court said in the case of *United States* v. *Buchalter*, 88 Fed. (2nd) 625, at page 626:

> "Difficulty of proof is no substitute for actuality of proof, and an accused is presumed to be innocent and entitled to be acquitted until proven guilty as charged."

No conspiracy was proved between any of the other appellants. Assuming, however, for purposes of argument that a conspiracy had been proven between Jack Liss and others, I. David Cohen and Huel's Chemists, Inc. were definitely not a member of this conspiracy since no evidence was introduced to prove same. It is elementary that in order to have a conspiracy one must have a meeting of the minds with another individual and have knowledge of the major portions of the conspiracy.

> *United States* v. *Koch, et al.*, 113 Fed. (2nd) 982.

Clearly, if the Government proved a conspiracy between the other co-defendants herein, they failed to prove that the appellants I. David Cohen and Huel's Chemists, Inc. were a part of that conspiracy, in that I. David Cohen and Huel's Chemists, Inc. were conducting a lawful act.

In *United States* v. *Falcone,* 109 Fed. (2nd) 579, the Circuit Court of Appeals for the Second Circuit, in reversing a conviction for conspiracy against a wholesaler who supplied sugar in a conspiracy to operate a still, stated at page 581:

> "There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normal lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. * * * We may agree that morally the defendants at bar should have refused to sell to illicit distillers, but both morally and legally to do so was toto coeto different from joining them in running the stills."

The Courts have repeatedly held that even the illegal purchase of a narcotic drug in and of itself would not substantiate a conviction in conspiracy; that it was necessary for the Government to prove a common purpose and an agreement to violate the Code.

Langer, et al. v. *United States,* 76 Fed. (2nd) 817.
Tinsley v. *United States,* 43 Fed. (2nd) 890.
Linde v. *United States,* 13 Fed. (2nd) 59.

The respondent in the Circuit Court of Appeals relied on the case of *Direct Sales Co., Inc.* v. *United States,* decided June 14, 1943, reported 131 F. (2nd) 835, to distinguish the case at bar from the *Falcone* case, *supra.* The distinction made is incorrect inasmuch as in the case of *Direct Sales Co., Inc.,* the commodity sold was morphine tablets, which in and of itself put the seller on notice, whereas in the case at bar the sale was not of a commodity which in and of itself would put a seller on notice. The lead and opium wash is used and sold extensively in small quantities by retail druggists, the same as Stoke's Expectorant and other remedies containing limited narcotic content. The extraction of morphine from lead and opium wash seemed so preposterous to the petitioner I. David Cohen that he was convinced of the truth of the statement by the defendant Liss that same was being used for the purposes of a liniment for race-horses.

POINT III

To purchase an exempt preparation from a retailer is not a crime, hence the appellants I. David Cohen and Huel's Chemists, Inc. cannot be guilty of a conspiracy for said sale.

There was no contention made by the prosecutor that it was illegal for anyone to purchase an exempt preparation from a pharmacist. The contention of the Government was that Huel's Chemists, Inc. failed to keep proper records of the sale pursuant to the rules and regulations of the Secretary of the Treasury of the United States.

Assuming for the purposes of argument that no proper records were kept by Huel's Chemists, Inc., and that that constituted a substantive crime, it is clear that one purchasing an exempt narcotic, to wit, lead and opium wash, or Stoke's Expectorant, or any other remedy which are considered exempt narcotics, would not be guilty of a crime.

The case of *Vannata* v. *United States,* 228 Fed. 424, held, if only a seller in a prohibition act was guilty of a crime and buyer was not guilty of a crime in buying, then the sale in and of itself could not be the subject of a conspiracy.

In the case at bar the sale of the lead and opium wash without keeping proper records may be a crime. However, the purchase of same could not possibly be a crime under the Code. Therefore, it would be impossible for appellants I. David Cohen or Huel's Chemists, Inc. to be guilty of a conspiracy in the sale of a limited narcotic preparation.

POINT IV

Appellants I. David Cohen and Huel's Chemists, Inc. were not accorded a fair and impartial trial as required by the Sixth Amendment of the Constitution.

Throughout the trial the Court prohibited counsel for I. David Cohen and Huel's Chemists, Inc. from exercising his free will in acting on behalf of the said defendants-appellants.

The Judge insisted that counsel for said appellants fail to make any objections unless the name of I. David Cohen was mentioned. It is clear that in a conspiracy case the proving of a complete conspiracy is necessary in order to sustain a conviction, and any attempt made by counsel to protect the interests of his client to disprove the complete conspiracy was certainly justified (see fols. 1667-1670).

Throughout the record the Court continuously lead witnesses for the prosecution in obtaining testimony for and on behalf of the Government.

The entire cross-examination of appellant I. David Cohen by the Assistant United States Attorney was directed toward impeaching the witness in reference to his ability as a chemist, after he had testified on three or four occasions that he was not a qualified chemist and did not re-

member his chemistry from college (fols. 2046-2109), consisting of twenty printed pages in the record. This tended to degrade the appellant I. David Cohen in the eyes of the jury on matters wherein he had failed to testify on direct examination, and was definitely improper cross-examination. Same was allowed after repeated objections on the part of counsel for said appellant.

It is difficult for the record to disclose exactly the demeanor of the Court in trying the case, as it is barren of the innuendoes and the facial expressions and the intonations of the voice of the Court. However, one present at the trial obtained the impression throughout the trial that the Court held all of the defendants in scorn and that they were to be disbelieved in anything that they said.

The Assistant United States Attorney, in his summation, continuously referred to the failure of witnesses to procure character witnesses. This was detrimental and prejudicial, as there is no duty for a defendant to produce character witnesses.

The late case of *Viereck* v. *United States,* in the October Term of 1942, in quoting from the *Berger* case (*Berger* v. *U. S.,* 295 U. S. 78, 88), stated thusly:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The following is an indication of the demeanor of the Assistant United States Attorney and the Court (fols. 1068-1071):

"Mr. Buchman: The tide of fortune might turn in my favor eventually.

The Court: All right. Go ahead.

Mr. Cannella: You mean the tide is not in your favor now?

Mr. Meadow: Your Honor, I move for a mistrial. I just heard the United States Attorney say that the tide was not in our favor in front of the jury, and I move for a mistrial, and ask for a ruling on it.

Mr. Cannella: I did not say that.

The Court: Disregard all remarks of lawyers. Motion denied.

Mr. Meadow: I respectfully except to your Honor's ruling in reference to the mistrial, and want this for the purpose of the record.

The Court: I heard you say that.

That defendants Al Fox and Max Fox do not join in that motion.

The Court: Go ahead.

Mr. Meadow: I want this for the purposes of the record.

The Court: Everything you say is on the record. Your motion is denied.

Mr. Meadow: Has he got the statement there with reference to the United States Attorney?

The Court: Sit down, please. You have been heard and I have disposed of it. You are interrupting the cross-examination."

The Court refused to accept the requests to charge, after the summation had been commenced by the other appellants but prior to the time that summation was commenced by appellants I. David Cohen and Huel's Chemists, Inc. (fols. 2405-2412).

CONCLUSION

It is, therefore, respectfully submitted that a writ o certiorari should be granted in this case.

Respectfully submitted,

SAUL M. MEADOW and BENJAMIN JAFF
Counsel for Petitioners,
1450 Broadway, New York, N. Y.

APPENDIX

STATUTES

TITLE 18—UNITED STATES CODE

§88. (*Criminal Code, Section 37.*) *Conspiring to commit offense against United States.*—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

TITLE 26—UNITED STATES CODE (INTERNAL REVENUE CODE)

SUBCHAPTER A.—OPIUM AND COCA LEAVES

§2550. *Tax*—(a) *Rate.*

There shall be levied, assessed, collected, and paid upon opium, coca leaves, any compound salt, derivative, or preparation thereof, produced in or imported into the United States, and sold, or removed for consumption or sale, an internal revenue tax at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce. The tax imposed by this subsection shall be in addition to any import duty imposed on the aforesaid drugs.

§2551. *Exemptions*—(a) *Preparations of limited narcotic content.*

The provisions of this subchapter and part V of subchapter A of chapter 27 shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium, or more than

one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce; or to liniments, ointments, or other preparations which are prepared for external use, only, except liniments, ointments, and other preparations which contain cocaine or any of its salts or alpha or beta eucaine or any of their salts or any synthetic substituted for them: Provided, That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this sub-chapter and said Part V: Provided further, That any manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies mentioned in this section lawfully entitled to manufacture, produce, compound, or vend such preparations and remedies, shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Secretary shall direct.

Such record shall be preserved for a period of two years in such a way as to be readily accessible to inspection by any officer, agent or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officers named in section 2556, and every such person so possessing or disposing of such preparations and remedies shall register as required in section 3221 and, if he is not paying a tax under section 3220, he shall pay a special tax of $1 for each year, or fractional part thereof, in which he is engaged in such occupation, to the collector of the district in which he carries on such occupation as provided in part V of subchapter A of chapter 27.

§2553. *Packages*—(a) *General requirement.* It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original

stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

§2554. *Order forms*—(a) *General requirement.* It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

(c) (2) *Prescriptions.*

To the sale, dispensing, or distribution of any of the drugs mentioned in section 2550 (a) by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under section 3221: *Provided, however,* That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: *And provided further,* That such dealer shall preserve such description for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials mentioned in section 2556.

(d) *Preservation.* Every person who shall accept any order required under subsection (a), and in pursuance thereof shall sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a), shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent,

or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section 2556.

(f) *Supply.* The Secretary shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors for sale by them to those persons who shall have registered and paid the special tax as required by sections 3221 and 3220 in their districts, respectively; * * *.

(g) *Unlawful use.* It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession. §2557.

* * * * * *

(b) *Violations in general.*

(1) Any person who violates or fails to comply with any of the requirements of this subchapter or part V of subchapter A of chapter 27, shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court.

(2) Any person required under this subchapter or section 3220 to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter or section 3220, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

§3220. *Tax.*

On or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall pay the special taxes hereinafter provided. Every person upon first engaging in any of such activities shall immediately pay the proportionate part of the tax for the period ending on the following June 30.

(a) *Importers, manufacturers, or producers.*

Importers, manufacturers, producers, or compounders, lawfuly entitled to import, manufacture, produce, or compound any of the aforesaid drugs, $24 per annum;

(b) *Wholesale dealers.*

Wholesale dealers, lawfully entitled to sell and deal in any of the aforesaid drugs, $12 per annum;

(c) *Retail dealers.*

Retail dealers, lawfully entitled to sell and deal in any of the aforesaid drugs, $3 per annum;

(e) *Persons engaged in research, instruction, or analysis.*

Persons not registered as an importer, manufacturer, producer, or compounder and lawfully entitled to obtain and use in a laboratory any of the aforesaid drugs for the purpose of research, instruction, or analysis shall pay $1 per annum, but such persons shall keep such special records relating to receipt, disposal, and stocks on hand of the aforesaid drugs as the Commissioner of Narcotics, with the approval of the Secretary, may by regulation require. Such special records shall be open at all times to the inspection of any duly authorized officer, employee, or agent of the Treasury Department.

(f) *Persons not otherwise taxed.*

For a tax of $1 a year on persons not otherwise taxed, dispensing preparations and remedies of limited narcotic content, see section 2551 (a).

§3221. *Registration*—(a) *Requirements.*

On or before July 1 of each year every person who engages in any of the activities enumerated in section 3220 shall register with the collector of the district his name or style, place of business and place or places where such business is to be carried on, and every person upon first engaging in any such activities shall immediately make like registration.

§3224. *Unlawful acts in case of failure to register and pay special tax*—(a) *Trafficking.*

It shall be unlawful for any person required to register under the provisions of this part or section 2551 (a) to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this part, or section 2551 (a).

(b) *Transportation.*

It shall be unlawful for any person who shall not have registered and paid the special tax as required by sections 3220 and 3221 to send, ship, carry, or deliver any of the aforesaid drugs from any State or Territory or the District of Columbia, * * *.

(c) *Possession.*

It shall be unlawful for any person who has not registered and paid the special tax as provided for by this part or section 2551 (a), to have in his possession or under his control any of the aforesaid drugs; and such possession

or control shall be presumptive evidence of a violation of this subsection and subsection (a), and also a violation of the provisions of sections 3220 and 3221 * * *.

REGULATIONS

(Treasury Regulations No. 5 [1938], relating to the "Importation, Manufacture, Production, Compounding, Sale, Dealing in, Dispensing and Giving Away of Opium or Coca Leaves or any Compound, Manufacture, Salt Derivative, or Preparation thereof.")

* * * * * * *

Art. 3. *Persons liable.*—Liability to payment of special tax and registration attaches to every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, administers, or gives away narcotics. As to the tax rates applicable to a person engaged in one or more of the foregoing activities see Article 13.

* * * * * * *

Art. 15. *Manufacturers and compounders.*—As a general rule, every person who, by compounding, mixing, or other process of manufacture, produces narcotic drugs or preparations for sale or distribution is subject to tax as a manufacturer or compounder at $24 per annum in Class I, with the following exceptions as to retail dealers:

* * * * * * *

Art. 25. *Partnerships.*—A partnership is subject to the same tax liability as an individual. Should either of the partners also individually engage in a taxable activity, he will incur additional liability with respect to such activity.

* * * * * * *

Art. 62. *Written order required.*—Except as otherwise provided, order forms are required for all sales or other dispositions of narcotic drugs.

* * * * * * *

Art. 90. *When not required.*—The use of order forms is not required:

* * * * * *

(5) For the sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than 2 grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than 1 grain of codeine, or any salt or derivative of any of them in 1 fluid ounce, or, if a solid, or semisolid preparation, in 1 avoirdupois ounce or of liniments, ointments, or other preparations which are prepared for external use only, except liniments, ointments, and other preparations which contain cocaine, or any of its salts or alpha or beta eucaine or any of their salts or any synthetic substitute for them, provided that such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this Act and that a record of dispositions is kept as required by Article 185.

* * * * * *

Art. 167. *Purpose of issue.*—A prescription, in order to be effective in legalizing the possession of unstamped narcotic drugs and eliminating the necessity for use of order forms, must be issued for legitimate medical purposes. The responsibility for the proper prescribing and dispensing of narcotic drugs is upon the practitioner, but a corresponding liability rests with the druggist who fills the prescription. An order purporting to be a prescription issued to an addict or habitual user of narcotics, not in the course of professional treatment but for the purpose of providing the user with narcotics sufficient to keep him comfortable by maintaining his customary use, is not a prescription within the meaning and intent of the act; and the person filling such an order, as well as the person issuing it, may be charged with violation of the law.

* * * * * *

Art. 182. *Restrictions on dispositions.*—A preparation conforming to the standards set out in Article 181 is exempt from stamp tax and the requirements pertaining to taxable narcotics only when manufactured, sold, distributed, given away, dispensed, or possessed as a medicine. A manufacturer may produce and sell as exempt only preparations readily capable of use for claimed medicinal purposes, and sales thereof, if not to consumers, shall be made only to persons registered in Class V. Sales made to consumers, either by manufacturers or dealers shall be made only in such quantities and with such frequency to the same purchaser as will restrict their use to the medicinal purpose for which intended.

* * * * * *

Art. 183. *Dispositions to dealers.*—Orders for exempt preparations except where sold to a registrant in Class VI are not required to be on any particular forms, but an order from a dealer shall not be honored by a manufacturer or other dealer unless it bears the registry number of the dealer giving the order.

* * * * * *

Art. 185. *Records required.*—Every manufacturer, producer, compounder, or vendor (including dispensing physicians), of exempt preparations shall record all sales, exchanges, gifts, or other dispositions, the entries to be made at the time of delivery. Separate records shall be kept of dispositions to registrants and of dispositions to consumers. The record of dispositions to registrants shall show the name, address, and registry number of the registrant to whom disposed, the name and quantity of the preparation, and the date upon which delivery to the registrant, his agent or a carrier is made. The record of dispositions to consumers shall show the name of the recipient, his address, the name and quantity of the preparation, and the date of delivery.

Art. 201. *Records open to inspection.*—Any officer, agent, or employee of the Treasury Department * * * authorized to enforce the act, * * * shall have authority to examine the books, papers, and records kept pursuant to these regulations, and may require the production thereof.

All order forms, duplicate forms, prescription records, returns, and inventories required under the act or these regulations to be kept on file shall be kept so that they can be readily inspected.

* * * * * * *

FILED

JUL 24 1953

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 285

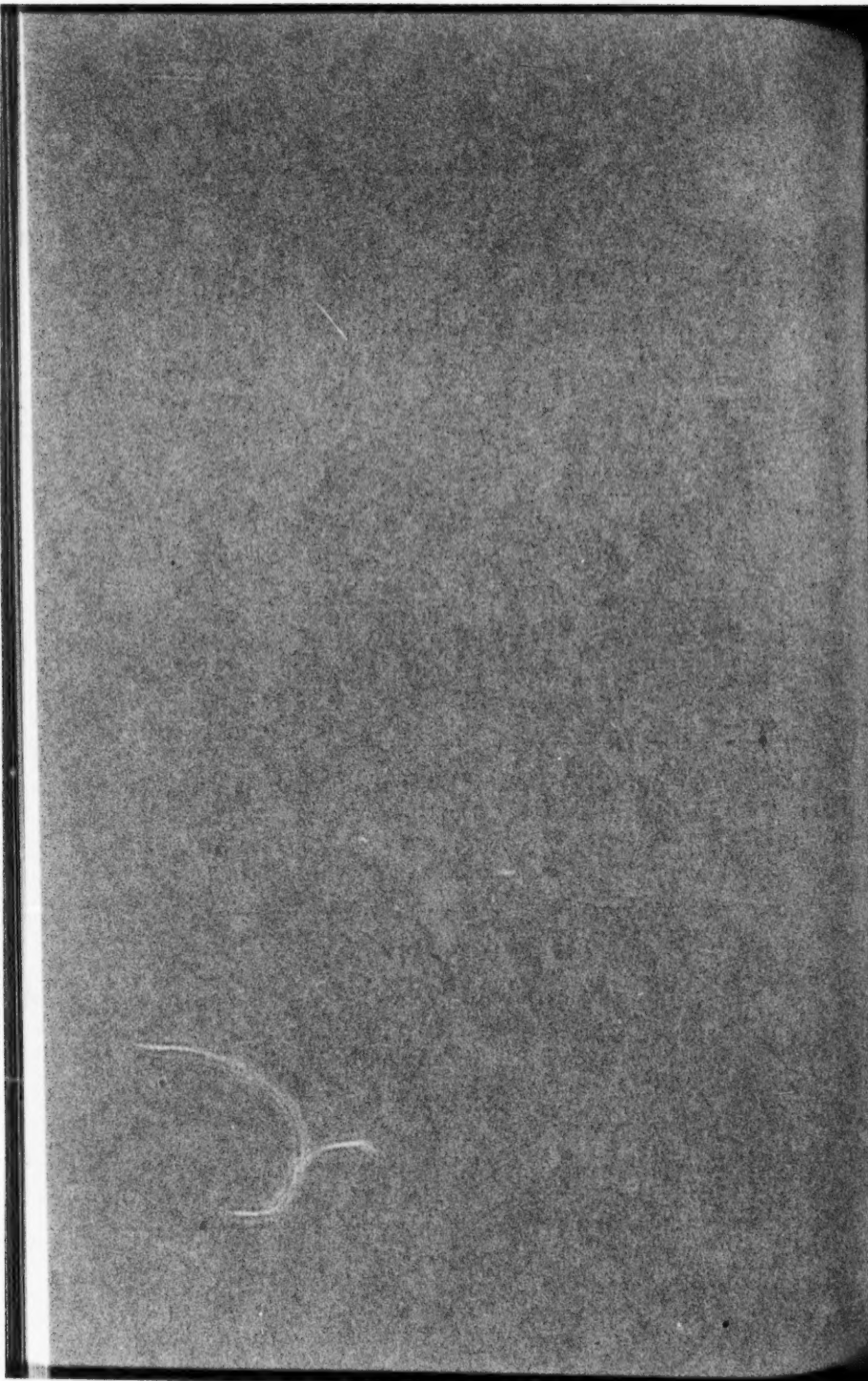
ALFRED MAINELLA,

Petitioner and Appellant below,

against

UNITED STATES OF AMERICA,

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



INDEX

PAGE

PETITION

Summary Statement of the Matter Involved 1

Jurisdiction to Review 2

Questions Presented 2

The Reasons Relied On for the Allowance for the Writ 5

BRIEF

Opinion of the Courts Below 11

Jurisdiction 11

Statement of the Case 12

Specification of Errors 12

Statutes and Regulations Involved 12

Argument 12

Conclusion 16

Appendix 17

CASES CITED

Direct Sales Co., Inc. v. United States, 63 S. C. 1265 ..... 6, 7, 13, 14, 15

Falcone v. United States, 311 U. S. 305 ..... 4, 7, 14

McElroy v. United States, 164 U. S. 76, 80 16

United States v. Smith, 112 Fed. (2d) 83, 85 16

STATUTES AND REGULATIONS CITED

PAGE

Revenue Act:
- Section 2550(A) 1
- Section 2551 1
- Section 2553 1
- Section 2554 1
- Section 3220 1
- Section 3221 1
- Section 3324 1

Judicial Code:
- Sections 240(a) and (c) as amended, 28 U. S. C. Section 347 2

United States Code:
- Title 18, Section 88 17
- Title 26, Section 2550(a) 17
- Title 26, Section 2551(a) 17
- Title 26, Section 2553 18
- Title 26, Section 2554(a) (c)(2) (d) (f) and (g) 19, 20
- Title 26, Section 2557(b)(1) (2) 20
- Title 26, Section 3220(a) (b) (c) (e) and (f) 21, 22
- Title 26, Section 3221(a) 22
- Title 26, Section 3224(a) (b) and (c) 22, 27
- Title 28, Section 391 13

Treasury Regulations No. 5 (1938) as follows:
- Article 3 23
- Article 15 23
- Article 25 23
- Article 62 23
- Article 90(5) 24
- Article 167 24
- Article 182 25
- Article 183 25
- Article 185 25
- Article 201 26

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No.

ALFRED MAINELLA,
Petitioner and Appellant below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Supreme Court of the United States:

The petition of ALFRED MAINELLA respectfully shows:

I

Summary Statement of the Matter Involved

Petitioner was convicted by a jury after a trial in the United States District Court for the Southern District of New York upon an indictment (R. 10-33) charging him together with nineteen other defendants with conspiracy to violate Revenue Laws with respect to narcotics; in particular Sections 2550(A), 2551, 2553, 2554, 3220, 3221 and 3224 of the Internal Revenue Code.

The petitioner, Alfred Mainella, was sentenced to serve a term of a year and a day and to pay a fine of $1,000.

The petitioner herein appealed to the United States Circuit Court of Appeals for the Second Circuit upon various grounds fully set forth in the Assignment of Errors (R. 862-871). Upon such appeal, the Circuit Court of Appeals for the Second Circuit, by a divided opinion, affirmed the conviction of this petitioner, Alfred Mainella, and rendered its opinion upon such affirmance.

II

Jurisdiction to Review

The United States Circuit Court of Appeals for the Second Circuit made its order for mandate herein, affirming the conviction of the petitioner, Alfred Mainella, on August 3, 1943 (R. 933). By its order, the said Circuit Court of Appeals has extended the time of all the appellants, including your petitioner, Alfred Mainella, to file their petitions for certiorari to this Court, up to and including August 25, 1943. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. Code, Section 347, subdivisions A and C, and as amended by Section 240(A) under the act of February 13, 1925, and Rule 38 of the Revised Rules (1939) of the Supreme Court of the United States. The reasons directly hereinafter further set forth constitute valid grounds for invoking the jurisdiction of this Court.

III

Questions Presented

1. Whether or not it was proper to combine in one indictment and offer in support thereof proof of three or four different conspiracies, all of which were separately different as to content, two of which were separate as to personnel, and several of which, even if proved, would

constitute no crime. The separate conspiracies, each of which the Government contended was criminal, were as follows:

A. The attempt to manufacture morphine synthetically.

B. To extract narcotics for illegitimate use from exempt narcotic preparations such as paregoric and opium lead wash.

C. To divert opium by means of a circulation through the various defendants of lead and opium wash, so that the manufacturer was claimed to have procured the return of all of the lead and opium wash manufactured by him and sold through the jobbers to the druggists and then supposedly returned to him intact. The manufacturer would then, it is claimed by the Government, show the manufacture and sales of lead and opium wash in greater quantity than actually made up and sold by him in order to enable him to secure additional raw opium to be put in the illegitimate market for direct use by drug addicts.

D. That all the defendants were in a venture to supply Liss and Conte with lead and opium wash, knowing that they meant to resell it, or that it was not to be used as medicine, or that no record should be kept of the sales, or of all these things.

The petitioner, Alfred Mainella concededly had no connection with conspiracy A and B (see Opinion of the Circuit Court of Appeals, R. 898-918). Conspiracy A, if successful, would not constitute a crime. Conspiracy C failed utterly of proof. It was never shown, directly or indirectly, that the lead and opium wash sold by the appellant Mainella to Liss and Conte, along with the lead and opium wash sold and delivered to Liss and Conte by other defendants, was ever returned or intended to be returned to the manufacturer thereof (see Opinion of the Circuit Court of Appeals, R. 898-918).

2. Whether or not there was a harmful and fatal variance between the allegations of the indictment and the proof as presented because of the foregoing, and by reason of the further contentions:

A. The jury may have confused the issues as to the appellant, Alfred Mainella.

B. The jury may have applied all the evidence adduced at the trial indiscriminately and without a proper regard to the pertinent testimony chargeable as against each separate defendant at the trial.

3. Whether or not the failure of the Trial Judge to tell the jury properly and adequately what the issues were for them to decide in this case, and whether or not the Trial Judge's instructions to the jury, being merely colloquial and consisting, in large, of a mere reading of the relevant statutes and the regulations involved, were sufficient and proper; and whether or not the finding that "the wilderness of the resulting verbiage (of the Trial Judge's charge to the jury) must have left them pretty much in the dark", do not require a finding by the Supreme Court that as a matter of law these defendants, including the petitioner, Alfred Mainella, did not have a fair and adequate trial because, in fact and in substance, there was no proper or adequate charge of the issues involved at the trial.

4. Whether or not the evidence adduced at the trial was sufficient to support a finding of guilt as to the petitioner, Alfred Mainella, and whether or not the affirmance of conviction by the Circuit Court of Appeals is not in direct conflict with applicable decisions of this Court, and particularly the decision of this Court in *Falcone* v. *United States,* 311 U. S. 305, as clarified and interpreted more fully in *Direct Sales Co., Inc.* v. *United States,* decided June 14, 1943, and reported in Supreme Court Reports, issue of July 1, 1943, 63 S. C. 1265.

IV

The Reasons Relied On for the Allowance for the Writ

A. The reasons set forth quite fully by the co-petitioners, Liss, Conte, Londoner, Fox and Cohen, whose petitions for Writs of Certiorari are to be filed simultaneously with that of this petitioner, Alfred Mainella, which are germane to and cover the substance of questions 1, 2 and 3 of the questions presented herein, are adapted as the reasons for the allowance of the Writ with respect to this petitioner, Alfred Mainella, without further repetition or argument herein, for the sake of brevity and economy. The reasons set forth in the dissenting opinion by Mr. Justice Frank herein are adopted as the grounds for the granting of this Writ with respect to reversible errors having been committed upon the trial herein with respect to all such subject matters set forth in questions 1, 2 and 3 presented herein.

B. All that was shown at the trial against the petitioner, Alfred Mainella, is substantially contained in his own free statement given to the Government agents at the time of his arrest and is set forth in pages 827 to 830 of the Transcript of the Record. The only other evidence against Mainella adduced by the Government was the testimony of its agent, Jacobs, that he took such statement and that he had little independent recollection of the matters contained therein; a concession that if Mr. Castarella, a Government agent, were recalled to the stand, he would testify that he made an inspection of petitioner's store and that he did not produce a narcotic exempt preparation book, and that he did not have any to produce (R. 587); and the introduction in evidence of certain invoices of shipments of lead and opium wash made to Alfred Mainella by various jobbers, Exhibits 17-17A (R. 888 admitted into evidence at p. 189); and Exhibit 39 (R. 89 admitted into evidence at p. 303).

That is the sum total of all the evidence adduced by the Government against the petitioner, Alfred Mainella. The facts contained in these proofs are not that clear and unequivocal proof required to show that an alleged conspirator intended "to further, promote and cooperate in a buyer's illegal use" of an exempt narcotic preparation such as the lead and opium wash involved herein. *Direct Sales Co. Inc.* v. *United States,* reported in 63 S. C. 1265, issue of July 1st, 1943, Supreme Court Reporter.

All that has been shown by the competent proof adduced against Mainella by the Government is that he, a retail druggist, at the behest of Liss, purchased and resold to Liss on seven different occasions, about 112 gallons of a limited narcotic preparation known as lead and opium wash, on the representation by Liss that it was to be used medicinally for the treatment of footsore race horses. These transactions covered a period from about May to September, 1940. Mainella inquired of his jobbers, such as the Long Island Drug Co., whether he, as a retail druggist, could sell quantities of 5 gallons of lead and opium wash to one customer at a time, and he was informed that he could because of there being no restrictions as to such sale. When Liss' demands increased even beyond his originally unusual purchases, Mainella began to doubt the propriety of such large sales of this preparation and refused to make further sales to Liss.

Concededly this preparation was a lead and opium wash, obviously a poison, used externally as a liniment only and incapable of being imbibed, or being used other than as a liniment. The Government, in rebuttal, sought by the testimony of a veterinarian to show that lead and opium wash was not commonly used as a liniment for race horses at the time involved in the indictment, although it had once been used for such a purpose; but not the slightest effort was made to connect the knowledge of such facts with the petitioner, Alfred Mainella, directly or indirectly. The statements of Mainella having been offered in evidence by

the Government itself as part of its case against him, the statements contained therein, unless clearly and forcefully shown to be untruthful and incorrect, are to be taken as part of the Government's case and proof against Mainella and not otherwise. There being no effort to refute or contradict the statements of Mainella that he made such sales to Liss in reliance upon Liss' representation that the lead and opium wash was for use upon footsore race horses, there is nothing in the Record to show that Mainella made such sales with guilty knowledge of any purported illicit use by Liss.

There is a complete absence of any evidence of criminal intent in any of the acts charged against Mainella.

As was said in the affirming opinion, "There may be doubt whether the evidence proved that the conspiracy contemplated that the sales should not be recorded", this amounts to a finding that the omission and the failure to keep any records whatsoever with respect to the sale of exempt narcotic preparations by the petitioner Mainella has not been connected with the conspiracy count alleged in the indictment on this point, and has been completely overruled as showing guilty knowledge and joinder in the conspiracy alleged in the indictment by the petitioner, Alfred Mainella, by mere reason of his failure to keep the required records.

The total effect of all the pertinent evidence against Mainella warrants a finding that he had no knowledge of any conspiracy in his sales of the lead and opium wash to Liss and that he at all times dealt with and intended to deal with these preparations only as a medicine and not for any illicit purpose, and that his conviction was without any justification under the authority of *United States* v. *Falcone*, 311 U. S. 205, and *Direct Sales Co. Inc.* v. *United States*, cited above.

C. The affirming opinion of the Circuit Court of Appeals with respect to the petitioner, Aifred Mainella, set forth

the grounds upon which it saw justification to affirm the conviction against him. The findings set forth against Mainella in this opinion are largely unfounded and not proved by the Record. This opinion states that Mainella sold large quantities—650 gallons to Liss. The only evidence with respect to sales by Mainella to Liss are as set forth hereinabove.

The testimony of the defendant Goldberg that he sold to Liss large quantities which were delivered or shipped to Liss, posing as the Frank Drug Company, to the store address of the petitioner, Alfred Mainella, was received in evidence only as against the defendant Liss and not against Mainella and cannot be used to support the conviction of the petitioner, Alfred Mainella (R. 156-159).

Similarly, the testimony of the defendants Fox that, following a telephone call, they delivered various amounts of lead and opium wash to the petitioner Mainella, was, by express ruling of the Trial Judge, admitted as to the defendants Fox only (R. 37, 38). It was, therefore, error on the part of the affirming Judges in the Circuit Court of Appeals to base their affirmance upon a finding that Mainella was chargeable with the sales of lead and opium wash referred to in the testimony of the witnesses Goldberg and Fox.

The affirming opinion further found that Mainella told a narcotic agent that two shipments of 100 gallons each, of lead and opium wash, shipped by a Providence druggist, had only been "dropped off in the alley in the rear of my store". This purported statement is taken bodily from the testimony of the Government agent, Robert Jacobs, at page 396 of the Record. However, the Court overlooked that this witness in so testifying was only attempting to give his independent recollection of the substance of the free and voluntary statement signed by Mainella preliminary to the statement itself being offered in evidence. As to the recollection of this Government agent, without referring to such statement, he was asked the following question and made this answer at page 382 of the Record:

"Q. Do you recall everything that was said at the time he came in and made the statement without looking at the paper that was signed? A. No, sir, I cannot."

In the statement made by Mainella to this Government witness Jacobs, the following statement was made by Mainella, "I have never met Dan Goldman, of Providence, Rhode Island, nor did I ever receive, as he claims, four fifty-gallon barrels of lead and opium wash, which he claims to have delivered and dropped off in the alley in the rear of my store" (R. 830). A mere reading of the pertinent parts of the Record, with respect to such testimony, it is respectfully submitted, shows in and of itself, that the Circuit Court misconstrued the testimony and the proper inferences and conclusions to be drawn therefrom with respect to the delivery by Goldman to Frank Drug Co., through Liss alone, and without any complicity of any guilty sort in such transactions on the part of the petitioner Mainella.

The further fact relied upon by the Circuit Court in affirming its conviction of the petitioner Mainella that he became "worried" over the quantities ordered by Liss, does not warrant an inference that the petitioner had guilty knowledge of an illicit use of the lead and opium wash by Liss. It might with more than equal weight, be argued that he might have become worried in the change in his status as a retail druggist in continuing to make sales of such large quantities of lead and opium wash to Liss, in that he was becoming a wholesaler or a jobber by continuing to make such large sales and nothing else. It is unreasonable to infer from such testimony that the petitioner Mainella knew of any illicit use of such lead and opium wash by Liss, or that he made such sales with intent to evade the purposes of the Harrison Anti Narcotic Act, Internal Revenue Code, 251(A), or that he made such sales with intent to further, promote and cooperate in the buyer's illegal use of such lead and opium wash.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, directing said court to certify and send to this Court a full and complete transcript of the records and proceedings of the said Circuit Court had in the case numbered and entitled on its Docket No. 1863, Calendar No. 223, United States of America, Appellee, v. Jack Liss, Appellant, to the end that the case may be reviewed and determined by this Court as provided for by the statute of the United States; and that judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such other and further relief as to this Court may seem proper.

Dated, August 23, 1943.

ALFRED MAINELLA,

By.....

CHARLES V. HALLEY, JR.,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No.

ALFRED MAINELLA,
Petitioner and Appellant below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Courts Below

There was no opinion rendered by the Trial Court relating to the within petitioners. The opinion of the Circuit Court below (R. 898-918), rendered on May 28, 1943, is still unreported.

II

Jurisdiction

A

The Court is respectfully referred to Subdivision II of the petition (supra, p. 2) on the question of Jurisdic-

tion. Said Subdivision II is herewith adopted and made a part of this brief.

III

Statement of the Case

A statement of the case has been made in the preceding petition under I (pp. 2-9), which is hereby adopted and made a part of this brief.

IV

Specification of Errors

The Errors relied upon are those set forth in the questions presented in Paragraph III of the foregoing petition, which are hereby adopted and made part of this brief.

V

Statutes and Regulations Involved

The Statutes and Regulations involved are set forth in the appendix.

ARGUMENT

A

The misconception of the learned Court below of the nature and extent of the evidence against the petitioner, Alfred Mainella, and the nature and extent of the evidence against him actually contained in the Record, are discussed in the foregoing petition.

Divorced of all the matter which was admitted into evidence as against certain defendants only, but not admitted as to the petitioner by express ruling of the Court, the

Record shows no more was proved in support of the petitioner's conviction than the following, namely:

The petitioner, a retail druggist having his place of business in Corona, N. Y., purchased and sold to one Liss, a total of 112 gallons of an exempt narcotic preparation known as lead and opium wash. This total was sold in a series of seven transactions extending over a period of three to four months. Each of the sales was made at Liss' solicitation and in reliance upon his representation that the wash was for use as a liniment for race horses.

The petitioner had known Liss prior to the time of the sales, as a licensed pharmacist and had in fact employed him for a short period of time in his own store. There had been nothing in the petitioner's former relations with Liss to lead him to believe, at least initially, that there was any reason to doubt Liss' representations. Some time later, however, Liss' repeated orders caused the petitioner to become uncertain as to his own status in making sales of the wash in quantity, and he thereupon refused to fill any further orders from Liss.

In view of the nature and extent of this proof, it is evident that the learned Court below sustained the petitioner's conviction on the wholly erroneous assumption that the mere sale by Mainella of lead and opium wash to Liss with the assumed knowledge that Liss' purpose was not to use the said wash as medicine was sufficient to sustain the conviction on the ground of conspiracy.

As succinctly stated by this learned Court in *Direct Sales Co., Inc.* v. *United States*, decided June 14, 1943, and reported at 63 S. C. 1265:

> "* * * one does not become a party to a conspiracy by aiding or abetting it by sales of supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally * * *."

In addition to the mere fact of knowledge, there must, of course, be proof, clear and unequivocal, of the seller's intent to further, promote and co-operate in the buyer's illegal use of the article and of his intent to make himself a party to the buyer's venture.

> *Direct Sales Co., Inc.* v. *United States* supra; *Falcone* v. *United States,* 311 U. S. 205.

In the immediate case, it seems evident that, quite unlike the evidence in the *Direct Sales Co., Inc.,* case, the evidence adduced against the petitioner does not support a finding that the petitioner intended in any way to further, promote or co-operate in Liss' illegal use of the lead and opium wash. On the contrary, the evidence expressly negatives any such finding in that it shows that the petitioner, immediately upon his suspicions being aroused, rejected any further orders from Liss and completely terminated the transactions.

At the very most, the evidence shows nothing more than that for some time the petitioner acted with "indifference to the buyer's illegal purpose and passive acquiescence in his desire to purchase, for whatever end."

It is submitted that upon such evidence the learned Court below was wholly unjustified in sustaining the petitioner's conviction herein, and that its judgment of affirmance should be reversed, in view of the rulings of this Court in the cases hereinabove cited.

The foregoing conclusion is reached even though, for the purpose of the argument, the petitioner has assumed as proved a fact which the learned Court below held to be established notwithstanding that there is not an iota of evidence in the Record to support its assumption, namely: that the petitioner sold the lead and opium wash to Liss with knowledge that Liss intended to use the same for a non-medicinal purpose and that the jury could have properly and in all probability did assume that the petitioner, as a druggist, "must have known that he was in an illicit enterprise when he bought the lead wash,

because these two (Liss and Conte) had been engaged in an earlier illicit enterprise, and in short (as the lower Court found) the jury have imputed to the druggist the mens rea of Liss and Conte".

Where in the entire Record is there even the semblance of any testimony, properly adduced against the petitioner, Alfred Mainella, which in the slightest supports any such finding, or which warranted the jury in finding that Mainella knew of Liss and Conte's earlier illicit enterprises, or that any of the actions of Mainella in this entire Record show his joining in any plan or conspiracy to deal with this lead and opium wash illicitly? All that has been shown was that the petitioner engaged in some "casual transactions, not amounting to a course of business regular, sustained and prolonged, and involving nothing more on the seller's part than indifference to the buyer's illegal purpose and passive acquiescence in his desire to purchase, for whatever end" (footnote 8, *Direct Sales Co., Inc.* v. *United States,* supra).

B

In view of the total paucity of evidence presented to show the petitioner's guilty complicity in the conspiracy charged, it seems certain that his conviction by the jury, and the subsequent affirmance of that conviction by the learned Court below, must be ascribed to the fact that the petitioner was not accorded a fair and impartial trial.

Thus, while this petitioner adopts the arguments on this point set forth in the petitions and briefs of his co-petitioners herein, and the dissenting opinion of Mr. Justice Frank in the Court below, and for the purpose of brevity and economy does not repeat those arguments in extenso, it must be apparent from the fact that even the learned Court below was wholly unable to analyze correctly the evidence against the petitioner that the methods and procedure followed on the trial totally confused and misled the jury and left them at the termination of the trial without any conception as to which of the many

charges made in the indictment related to any particular defendant, and what part of the vast maze of evidence bore on the Government's case against any particular defendant.

Certainly, if the learned Justices below, with the printed Record before them for their perusal, were unable, by reason of the very confusion and prolixity of the Record, to evaluate the proof against the petitioner, it is self-evident that the misjoinder in the indictment of multiple and unrelated conspiracies with different personnel alleged to be involved in each conspiracy, and all but one of them being totally unrelated to the case against the petitioner, and the subsequent mass trial of the twenty distinct defendants without any proper distinction being made among them with respect to the particular charge or charges on which they were being prosecuted, coupled with the Trial Court's failure to enlighten the jury and properly charge them upon the issues involved, should lead to one finding: the petitioner was not accorded a fair trial, and there was error of such a substantial and prejudicial nature as to require the reversal of his conviction.

McElroy v. *United States,* 164 U. S. 76;
United States v. *Smith,* 112 Fed. (2d) 83, 85.

CONCLUSION

It is respectfully submitted that the questions raised in this case are of sufficient importance to require this Court to issue a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit to review its decision made herein.

Respectfully submitted,

CHARLES V. HALLEY, JR.,
Counsel for Petitioner.

APPENDIX

STATUTES

TITLE 18—UNITED STATES CODE

§88. (*Criminal Code, Section 37.*) *Conspiring to commit offense against United States.*—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

TITLE 26—UNITED STATES CODE (INTERNAL REVENUE CODE)

SUBCHAPTER A.—OPIUM AND COCA LEAVES

§2550. *Tax*—(a) *Rate.*

There shall be levied, assessed, collected, and paid upon opium, coca leaves, any compound salt, derivative, or preparation thereof, produced in or imported into the United States, and sold, or removed for consumption or sale, an internal revenue tax at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce. The tax imposed by this subsection shall be in addition to any import duty imposed on the aforesaid drugs.

§2551. *Exemptions*—(a) *Preparations of limited narcotic content.*

The provisions of this subchapter and part V of subchapter A of chapter 27 shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium, or more than

one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce; or to liniments, ointments, or other preparations which are prepared for external use, only, except liniments, ointments, and other preparations which contain cocaine or any of its salts or alpha or beta eucaine or any of their salts or any synthetic substituted for them: Provided, That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this sub-chapter and said Part V: Provided further, That any manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies mentioned in this section lawfully entitled to manufacture, produce, compound, or vend such preparations and remedies, shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Secretary shall direct.

Such record shall be preserved for a period of two years in such a way as to be readily accessible to inspection by any officer, agent or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officers named in section 2556, and every such person so possessing or disposing of such preparations and remedies shall register as required in section 3221 and, if he is not paying a tax under section 3220, he shall pay a special tax of $1 for each year, or fractional part thereof, in which he is engaged in such occupation, to the collector of the district in which he carries on such occupation as provided in part V of subchapter A of chapter 27.

§2553. *Packages*—(a) *General requirement.* It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original

stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

§2554. *Order forms*—(a) *General requirement.* It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

(c) (2) *Prescriptions.*

To the sale, dispensing, or distribution of any of the drugs mentioned in section 2550 (a) by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under section 3221: *Provided, however,* That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: *And provided further,* That such dealer shall preserve such description for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials mentioned in section 2556.

(d) *Preservation.* Every person who shall accept any order required under subsection (a), and in pursuance thereof shall sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a), shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent,

or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section 2556.

(f) *Supply.* The Secretary shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors for sale by them to those persons who shall have registered and paid the special tax as required by sections 3221 and 3220 in their districts, respectively; * * *.

(g) *Unlawful use.* It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession. §2557.

* * * * * * *

(b) *Violations in general.*

(1) Any person who violates or fails to comply with any of the requirements of this subchapter or part V of subchapter A of chapter 27, shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court.

(2) Any person required under this subchapter or section 3220 to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter or section 3220, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

§3220. *Tax.*

On or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall pay the special taxes hereinafter provided. Every person upon first engaging in any of such activities shall immediately pay the proportionate part of the tax for the period ending on the following June 30.

(a) *Importers, manufacturers, or producers.*

Importers, manufacturers, producers, or compounders, lawfuly entitled to import, manufacture, produce, or compound any of the aforesaid drugs, $24 per annum;

(b) *Wholesale dealers.*

Wholesale dealers, lawfully entitled to sell and deal in any of the aforesaid drugs, $12 per annum;

(c) *Retail dealers.*

Retail dealers, lawfully entitled to sell and deal in any of the aforesaid drugs, $3 per annum;

(e) *Persons engaged in research, instruction, or analysis.*

Persons not registered as an importer, manufacturer, producer, or compounder and lawfully entitled to obtain and use in a laboratory any of the aforesaid drugs for the purpose of research, instruction, or analysis shall pay $1 per annum, but such persons shall keep such special records relating to receipt, disposal, and stocks on hand of the aforesaid drugs as the Commissioner of Narcotics, with the approval of the Secretary, may by regulation require. Such special records shall be open at all times to the inspection of any duly authorized officer, employee, or agent of the Treasury Department.

(f) *Persons not otherwise taxed.*

For a tax of $1 a year on persons not otherwise taxed, dispensing preparations and remedies of limited narcotic content, see section 2551 (a).

§3221. *Registration*—(a) *Requirements.*

On or before July 1 of each year every person who engages in any of the activities enumerated in section 3220 shall register with the collector of the district his name or style, place of business and place or places where such business is to be carried on, and every person upon first engaging in any such activities shall immediately make like registration.

§3224. *Unlawful acts in case of failure to register and pay special tax*—(a) *Trafficking.*

It shall be unlawful for any person required to register under the provisions of this part or section 2551 (a) to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this part, or section 2551 (a).

(b) *Transportation.*

It shall be unlawful for any person who shall not have registered and paid the special tax as required by sections 3220 and 3221 to send, ship, carry, or deliver any of the aforesaid drugs from any State or Territory or the District of Columbia, * * *.

(c) *Possession.*

It shall be unlawful for any person who has not registered and paid the special tax as provided for by this part or section 2551 (a), to have in his possession or under his control any of the aforesaid drugs; and such possession

or control shall be presumptive evidence of a violation of this subsection and subsection (a), and also a violation of the provisions of sections 3220 and 3221 * * *.

REGULATIONS

(Treasury Regulations No. 5 [1938], relating to the "Importation, Manufacture, Production, Compounding, Sale, Dealing in, Dispensing and Giving Away of Opium or Coca Leaves or any Compound, Manufacture, Salt Derivative, or Preparation thereof.")

* * * * * * *

Art. 3. *Persons liable.*—Liability to payment of special tax and registration attaches to every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, administers, or gives away narcotics. As to the tax rates applicable to a person engaged in one or more of the foregoing activities see Article 13.

* * * * * * *

Art. 15. *Manufacturers and compounders.*—As a general rule, every person who, by compounding, mixing, or other process of manufacture, produces narcotic drugs or preparations for sale or distribution is subject to tax as a manufacturer or compounder at $24 per annum in Class I, with the following exceptions as to retail dealers:

* * * * * * *

Art. 25. *Partnerships.*—A partnership is subject to the same tax liability as an individual. Should either of the partners also individually engage in a taxable activity, he will incur additional liability with respect to such activity.

* * * * * * *

Art. 62. *Written order required.*—Except as otherwise provided, order forms are required for all sales or other dispositions of narcotic drugs.

* * * * * * *

Art. 90. *When not required.*—The use of order forms is not required:

* * * * * *

(5) For the sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than 2 grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than 1 grain of codeine, or any salt or derivative of any of them in 1 fluid ounce, or, if a solid, or semisolid preparation, in 1 avoirdupois ounce or of liniments, ointments, or other preparations which are prepared for external use only, except liniments, ointments, and other preparations which contain cocaine, or any of its salts or alpha or beta eucaine or any of their salts or any synthetic substitute for them, provided that such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this Act and that a record of dispositions is kept as required by Article 185.

* * * * * *

Art. 167. *Purpose of issue.*—A prescription, in order to be effective in legalizing the possession of unstamped narcotic drugs and eliminating the necessity for use of order forms, must be issued for legitimate medical purposes. The responsibility for the proper prescribing and dispensing of narcotic drugs is upon the practitioner, but a corresponding liability rests with the druggist who fills the prescription. An order purporting to be a prescription issued to an addict or habitual user of narcotics, not in the course of professional treatment but for the purpose of providing the user with narcotics sufficient to keep him comfortable by maintaining his customary use, is not a prescription within the meaning and intent of the act; and the person filling such an order, as well as the person issuing it, may be charged with violation of the law.

* * * * * *

Art. 182. *Restrictions on dispositions.*—A preparation conforming to the standards set out in Article 181 is exempt from stamp tax and the requirements pertaining to taxable narcotics only when manufactured, sold, distributed, given away, dispensed, or possessed as a medicine. A manufacturer may produce and sell as exempt only preparations readily capable of use for claimed medicinal purposes, and sales thereof, if not to consumers, shall be made only to persons registered in Class V. Sales made to consumers, either by manufacturers or dealers shall be made only in such quantities and with such frequency to the same purchaser as will restrict their use to the medicinal purpose for which intended.

* * * * * *

Art. 183. *Dispositions to dealers.*—Orders for exempt preparations except where sold to a registrant in Class VI are not required to be on any particular forms, but an order from a dealer shall not be honored by a manufacturer or other dealer unless it bears the registry number of the dealer giving the order.

* * * * * *

Art. 185. *Records required.*—Every manufacturer, producer, compounder, or vendor (including dispensing physicians), of exempt preparations shall record all sales, exchanges, gifts, or other dispositions, the entries to be made at the time of delivery. Separate records shall be kept of dispositions to registrants and of dispositions to consumers. The record of dispositions to registrants shall show the name, address, and registry number of the registrant to whom disposed, the name and quantity of the preparation, and the date upon which delivery to the registrant, his agent or a carrier is made. The record of dispositions to consumers shall show the name of the recipient, his address, the name and quantity of the preparation, and the date of delivery.

Art. 201. *Records open to inspection.*—Any officer, agent, or employee of the Treasury Department * * * authorized to enforce the act, * * * shall have authority to examine the books, papers, and records kept pursuant to these regulations, and may require the production thereof.

All order forms, duplicate forms, prescription records, returns, and inventories required under the act or these regulations to be kept on file shall be kept so that they can be readily inspected.

* * * * * * *

(16)

Office - Supreme Court, U. S.
FILED
AUG 24 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 286

AL N. FOX and MAX FOX,

Petitioners and Appellants below,

against

UNITED STATES OF AMERICA,

Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

MAX SCHWARTZ,
ALBERT LYONS,
Attorneys for Petitioners,
Offices respectively at
26 Court Street,
Brooklyn, N. Y.,
and
84 William Street,
New York City.

CORPORATE PRESS, INC., NEW YORK CITY

INDEX

	PAGE
PETITION	1
Summary Statement of the Matter Involved	1
Questions Presented	3
Jurisdiction	6
Reasons Relied on for the Allowance of the Writ	6
BRIEF	9
Opinion of the Courts Below	9
Jurisdiction	9
Statement of the Case	10
Specification of Errors	10
Statutes and Regulations Involved	11
Argument	11
Conclusion	17
Appendix	18

Cases Cited

	PAGE
Adler v. U. S., 182 Fed. 464	16
In re Barnett, 124 Fed. (2d) 1005	17
Brasfield v. U. S., 272 U. S. 448	17
Brunov v. U. S., 308 U. S. 287	17
Christian v. B. M. R. R., 109 Fed. (2d) 103	17
Crawford v. U. S., 212 U. S. 183	17
De Jianne v. U. S., 282 Fed. 737	16
Eckert v. U. S., 7 Fed. (2d) 257	15
Falcone v. U. S., 311 U. S. 205	13, 14, 15
Fort Dodge Hotel Co. v. Bartelt, 119 Fed. (2d) 253	17
Frantz v. U. S., 62 Fed. (2d) 737	16
Gebardi v. U. S., 287 U. S. 112	13
Keliher v. U. S., 193 Fed. 8	16
Kreiner v. U. S., 11 Fed. (2d) 722	16
Marcante v. U. S., 49 Fed. (2d) 156	12
Mattox v. U. S., 146 U. S. 140	17
McCandless v. U. S., 298 U. S. 342	17
McElroy v. U. S., 164 U. S. 76	12, 13
Meadows v. U. S., 82 Fed. (2d) 881	17
Moore v. U. S., 224 Fed. 95	16
N. Y. C. R. Co. v. Johnson, 279 U. S. 310	17
Owen v. Owen, 22 Iowa 270	16
People v. Odell, 230 N. Y. 481	16
Schilling v. Delaware & H. R. Corp., 114 Fed. (2d) 69	17
Tellman v. U. S., 67 Fed. (2d) 716	12
Terry v. U. S., 7 Fed. (2d) 28	12
U. S. v. Atkinson, 297 U. S. 157	17
U. S. v. Byers, 73 Fed. (2d) 419	14
U. S. v. Dickerson, 18 Fed. (2d) 887	13
U. S. v. Dietrich, 126 Fed. 664	13
U. S. v. Groves, 122 Fed. (2d) 87	12
U. S. v. Katz, 271 U. S. 354	13
U. S. v. Koch, 113 Fed. (2d) 982	13
U. S. v. Lotsch, 102 Fed. (2d) 35	12
U. S. v. McConnell, 285 Fed. 164	12

	PAGE
U. S. v. N. Y. Central & H. R. R. Co., 146 Fed. 298	13
U. S. v. Pandolfi, 110 Fed. (2d) 113	13
U. S. v. Peoni, 100 Fed. (2d) 401	13
U. S. v. Quick, 128 Fed. (2d) 832	16
U. S. v. Sager, 49 Fed. (2d) 725	13
U. S. v. Silva, 109 Fed. (2d) 531	12
U. S. v. St. Pierre, 132 Fed. (2) 837	17
U. S. v. Wills, 36 Fed. (2d) 855	12
U. S. v. Zeuli (CCA, 2d Circuit, decided August 2, 1943, presently unreported)	13
Van Gorder v. U. S., 21 Fed. (2d) 939	17
Wiborg v. U. S., 163 U. S. 632	17
Wilmington Mining v. Fulton, 205 U. S. 60	17
Wyatt v. U. S., 23 Fed. (2d) 791	12
Young v. U. S., 48 Fed. (2d) 26	13

Statutes and Regulations Cited

United States Code, Title 18, Section 88	18
United States Code, Title 26, Section 2550 (a)	18
United States Code, Title 26, Section 2551 (a)	18
United States Code, Title 26, Section 2553	19
United States Code, Title 26, Section 2554 (a), (c), (2), (d), (f) and (g)	20
United States Code, Title 26, Section 2557 (b), (1), (2)	21
United States Code, Title 26, Section 3220 (a), (b), (c), (e) and (f)	22
United States Code, Title 26, Section 3221 (a)	23
United States Code, Title 26, Section 3224 (a), (b) and (c)	23
United States Code, Title 28, Section 391	16
Treasury Regulations No. 5 (1938) as follows:	
Article 3	24
Article 15	24
Article 25	25
Article 62	25
Article 90 (5)	25
Article 167	25
Article 182	26
Article 183	26
Article 185	26
Article 201	27

Supreme Court of the United States

OCTOBER TERM, 1943

No. ....

AL N. FOX and MAX FOX,
Petitioners and Appellants below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Supreme Court of the United States:

The petition of Al N. Fox and Max Fox respectfully shows:

I.

Summary Statement of the Matter Involved.

Petitioners were convicted by a jury after a trial in the United States District Court for the Southern District of New York upon an indictment (R. 10-33) charging them together with eighteen other defendants with conspiracy to violate the Internal Revenue Laws in connection with the manufacture, sale and general illegitimate use of and traffic in narcotics.

Said petitioners Al N. Fox and Max Fox were each sentenced to serve a term of a year and a day and to pay a fine of $1,000.

The petitioners herein appealed to the United States Circuit Court of Appeals for the Second Circuit upon various grounds fully set forth in the Assignments of Error (R. 862-871).

In the interest of brevity we shall summarize such of the grounds which were relied on below and which will be relied on in this Court if this petition is granted. Said grounds are as follows:

1. The evidence failed to prove the petitioners guilty of the crime charged.

2. The conspiracy charged in the indictment in a single count and under the proof actually embraced several different conspiracies, different in personnel as well as in content and there was therefore, a misjoinder.

3. There was a fatal, harmful variance between allegation and proof.

4. The judge's colloquial charge was obscure, unenlightening and wholly inadequate to enable the jury to arrive at a result by a process of intelligent discrimination.

5. The trial was unfair.

While the Assignments of Error are very broad and detailed, in substance and effect the foregoing constitutes a fair summary of so much thereof as are now relied upon. It should be noted that at the end of the government's case and of the entire case as well as throughout the trial appropriate motions were made under which these grounds may be subsumed. The trial judge, to conserve time, gave

every defendant the benefit of every motion made whether made by him or by another defendant (R. 28, 29, 340, 600-610, 611, 757, 767, 770).

Questions Presented.

1. Was it proper to combine in one indictment and offer in support thereof proof of four different conspiracies all of which were different as to content, two of which were separate as to personnel and ~~three~~ one of which even if proved would constitute no crime? The four conspiracies, each of which the government contended was criminal, were as follows:

A. To manufacture morphine synthetically.

B. To extract narcotics for illegitimate use from tax exempt narcotic preparations.

C. To divert opium. This requires some amplification. The plan charged was that sales of lead and opium wash would be made from the manufacturers (defendant Londoner's concern) through jobbers as selling agents (the petitioners herein Al N. Fox and Max Fox) to retail druggists defendants Cohen, Mainella and others) and then the druggists would sell to defendant Liss and he, Liss, would return the lead and opium wash to Londoner. The theory was that Londoner would use the same lead and opium wash and put it through the same course of sales. He would then be able to show in his return to the Government the manufacture and sale of quantities of lead and opium wash more than was actually the case and thus he would be in a position to secure additional opium to be put into the illegitimate market.

D. To sell lead and opium wash in violation of regulations limiting its sale to non-medicinal pur-

poses, requiring the keeping of records and providing that all dealers must be registered.

The Fox petitioners, had no connection with conspiracy A and B. See opinion of the Circuit Court of Appeals (R. 900 and 902). Conspiracy A, if successful, would not constitute a crime. See opinion of the Circuit Court of Appeals (R. 900).

Conspiracy C failed utterly of proof. See opinion of the Circuit Court of Appeals (R. 900-901-902). A vital link was missing, namely, it was never shown directly or indirectly that the lead and opium wash was returned or intended to be returned to Londoner.

2. Was there not a harmful and fatal variance between allegation and proof because of what has hereinbefore been set forth, and by reason of the following further contentions?:

A. The jury may have confused the issues.

B. The jury may have applied all the evidence indiscriminately and cumulatively against each petitioner whereas substantial parts of said evidence related to conspiracies to which these petitioners were not a party, and substantial portions of said evidence related to conspiracies which constitute no crime and to conspiracies which utterly failed of proof. Conspiracy A constituted no crime. Conspiracy C utterly failed of proof.

3. Was not the judge's colloquial charge obscure and unenlightening to a point where because of all the foregoing it prevented the jury from intelligently considering the case?

4. Was not the trial unfair because of number 3 directly hereinbefore set forth, as well as on the following additional grounds to wit?:—the trial judge plainly exhibited bias toward the government and against the defendants.

He often undertook the examination of government witnesses and cross examined the defendants and their witnesses. He belittled, personally attacked and generally exhibited an adverse partisan attitude towards the defendants and their counsel. In this connection we respectfully refer the court to the following pages in the Record: 53, 54, 79, 80, 109, 110, 160-162, 165, 167-174, 218, 219, 226, 229, 232, 234, 237-239, 245-249, 250, 259, 260, 261-275, 281, 282, 287, 288, 291, 293, 295, 296, 298-300, 302, 314, 354-357, 362, 363, 377-379, 449-451, 460, 556, 557, 570, 571, 609-611, 672-675. We make the observation that while no single instance suffices, all the incidents together warrant the presentation of this question No. 4. Reference to these pages is not intended to be exhaustive. They are merely illustrative. It is only by reading the entire record that this Court can gain a full appreciation of the extent to which the trial judge injected himself into the case in the matter of examining and cross examining witnesses and of guiding the case in and espousing the government's interest.

5. Was not the evidence insufficient to connect the petitioners with and to support conspiracy D by virtue of the principles that where sales are legitimate (i. e., the sale from Londoner through the Foxes, to the druggists) the seller cannot be linked with the purchaser in a conspiracy because the purchaser intends a criminal use of the articles sold and that if a crime (here the sale) involves the mutual cooperation of two persons who in fact have committed the crime they may not be convicted of a conspiracy to commit it? Clearly the sales from Londoner through the Foxes to the druggists were legitimate. The sellers had permits to sell, the druggists had permits to buy and the Circuit Court, in its majority opinion at the end thereof, indicated that records were kept or at least there was no proof that they were not kept. (See discussion & reference to the Record pages hereinafter set forth at pages 13-14.)

II.

Jurisdiction.

A.

The United States Circuit Court of Appeals for the Second Circuit made its order for mandate herein on August 3, 1943 (R. 933).

B.

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. Code, Sec. 347, subd. a and c and Rule 38 of the revised rules (1939) of the Supreme Court of the United States.

C.

The reasons directly hereinafter set forth constitute valid grounds for invoking the jurisdiction of this Court.

III.

Reasons Relied on for Allowance of the Writ.

The decision of the Circuit Court of Appeals is in direct conflict with the applicable law established by the Supreme Court of the United States and by various Circuit Courts of Appeal throughout the country.

The principles of law insofar as they apply to the case at bar are as follows:

1. It is improper to combine under one single count indictment and offer proof of four different conspiracies all of which are different as to content, two of which are separate as to personnel, two of which utterly failed of proof and one of which, if proved, constituted no crime.

2. Such a combination and joinder plus the failure of proof creates a variance which is harmful and fatal, particularly so where the judge's charge to the jury is of a colloquial, obscure and unenlightening nature, and inadequately provides a basis for intelligent, discriminating judgment on the part of the jury.

3. A charge to the jury as herein described is tantamount to an unfair trial.

4. In addition to and in connection with the foregoing the trial was unfair, because the trial judge plainly exhibited bias toward the government and against the defendants. He often undertook the examination of government witnesses and cross examined the defendants and their witnesses. He belittled, personally attacked and generally exhibited an adverse partisan attitude towards the defendants and their counsel.

5. Where there is a sale of an article which the buyer intends to use illegally the seller cannot be indicted with the buyer for conspiracy to make the illegal use. This even though the seller may know of the alleged illegal use of the subject of the sale. Certainly if the seller does not know. Furthermore if the sale is a crime it involves the mutual cooperation of two persons and if these two in fact have committed the crime they may not be convicted of a conspiracy to commit it.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, directing said Court to certify and send to this Court a full and complete transcript of the records and proceedings of the said Circuit Court had in the case numbered and entitled on its docket No. 1863, calendar No. 223, *United States of America*, Appellee v. *Jack Liss*, Appellant, to the end that

the case may be reviewed and determined by this Court as provided for by the statute of the United States; and that judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such other and further relief as to this Court may seem proper.

Dated, August 20, 1943.

AL N. FOX,
MAX FOX,

By Max Schwartz,
Counsel for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. ....

AL N. FOX and MAX FOX,
Petitioners and Appellants below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Opinion of the Courts Below.

There was no opinion rendered by the Trial Court relating to the within petitioners. The opinion of the Circuit Court below (R. 898-918), rendered on May 28, 1943, is still unreported.

II.

Jurisdiction.

A.

The Court is respectfully referred to Subdivision II of the petition (*supra,* p. 6) on the question of Jurisdiction. Said Subdivision II is herewith adopted and made a part of this brief.

III.

Statement of the Case.

A statement of the case has been made in the preceding petition under I (pp. 1-3), which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

A. The Circuit Court erred in sustaining a conviction because it was improper to combine under one single count indictment and offer proof of four different conspiracies, all of which were different as to content, two of which were separate as to personnel, two of which thoroughly failed of proof, and one of which even if proved, would constitute no crime.

B. The Circuit Court erred in sustaining the conviction because there was harmful and fatal variance between allegations and proof because of what has directly hereinbefore been set forth and because of the following additional factors:

1. The jury may have confused the issues.

2. The jury may have applied all the evidence indiscriminately and cumulatively against each petitioner whereas substantial parts thereof related to conspiracies to which these petitioners were not a party, and substantial portions of said evidence related to a conspiracy which as a matter of law constituted no crime.

C. The Circuit Court erred in sustaining the conviction because the Judge's colloquial charge was obscure and unenlightening to a point where, because of all the foregoing, it prevented the jury from intelligently considering the case.

D. The Circuit Court erred in sustaining the conviction because the trial was unfair by reason of the matter directly hereinbefore set forth under C as well as on the following additional grounds: the trial judge plainly exhibited bias towards the government and against the defendants. He often undertook the examination of government witnesses and cross examined the defendants and their witnesses. He belittled, personally attacked and generally exhibited an adverse partisan attitude toward defendants' counsel.

E. The Circuit Court erred in sustaining the conviction because the evidence was not sufficient to connect the petitioners with or to sustain proof of a conspiracy.

Statutes and Regulations Involved.

The Statutes and Regulations involved are set forth in the appendix.

Argument.

A.

The jury's verdict as against the Fox petitioners can stand, if at all, only on the theory that they conspired to sell lead and opium wash for non-medicinal purposes. The Government's case as per the opening of the prosecutor (R. 18-26), contemplated a three-fold conspiracy to synthesize opium, to extract it and to divert it. The Circuit Court of Appeals has decided that the synthetic phase was abandoned, and anyway would constitute no crime, and that the diversion phase utterly failed of proof. The Circuit Court of Appeals has also decided as per its opinion that under the evidence, the petitioners had no part in the synthetic phase and the extraction phase, that the diversion phase of the conspiracy failed of proof and that there was a variance between the allegations and proof. The theory on which the verdict now rests as to these petitioners was not ap-

parent to the prosecutor or to the trial judge. We find no mention of it in the opening statement, throughout the case or in the trial judges charge. The probability of confusion must be apparent even as an abstract probability when we consider the number of defendants involved, the length of the trial, the number of conspiracies, their differences as to content and personnel and the admittedly colloquial, unenlightening and obscure charge of the judge. We pass from the abstract to the reality when we consider that the only theory on which the conviction now rests as to these petitioners was not advanced at the trial by judge or prosecutor and was only raised for the first time on appeal to the Circuit Court. If neither prosecutor nor trial judge perceive this theory how can we possibly suppose that the jury, amid all the confusion, came to their verdict on this theory? The question answers itself.

The joinder of crimes has frequently been passed upon. Many cases exist on the subject. In some the joinder has been sustained and in others condemned. At best it has been said to be harmless error. The dividing line obviously depends upon degree. At the one extreme we have the case of *McElroy* v. *U. S.*, 164 U. S. 76, where the conviction was reversed. At the other extreme we have the case of *U. S.* v. *Lotsch*, 102 Fed. (2d) 35 where the conviction was sustained. It is really a matter of degree. In the following cases joinder has been held fatal:— *Marcante* v. *U. S.*, 49 Fed. (2d) 156; *U. S.* v. *Wills*, 36 Fed. (2d) 855; *Tellman* v. *U. S.*, 67 Fed. (2d) 716; *U. S.* v. *Groves*, 122 Fed. (2d) 87; *U. S.* v. *Silva*, 109 Fed. (2d) 531; *Wyatt* v. *U. S.*, 23 Fed. (2d) 791; *Terry* v. *U. S.*, 7 Fed. (2d) 28; *U. S.* v. *McConnell*, 285 Fed. 164.

It is submitted that the case at bar more clearly calls for condemnation of the joinder and variance and for consequent reversal than any of the decided cases. As the dissenting Judge of the Circuit Court of Appeals in the

case at bar has said "The ruling here is the furthest north of the *McElroy* case to be found in the books."

B.

The principle that the seller and buyer cannot be indicted for conspiracy to use the article of sale illegally unless the seller proposes to join and has a stake in the subsequent illegal use is well settled. See *Falcone* v. *U. S.*, 311 U. S. 205; *U. S.* v. *Peoni*, 100 Fed. (2d) 401; *U. S.* v. *Koch*, 113 Fed. (2d) 982; *Young* v. *U. S.*, 48 Fed. (2d) 26; *U. S.* v. *Dickerson*, 18 Fed. (2d) 887; *U. S.* v. *Pandolfi*, 110 Fed. (2d) 113. Furthermore if the sale is a crime it involves the mutual cooperation of two persons and if these two in fact have committed the crime they may not be convicted of a conspiracy to commit it. *U. S.* v. *Dietrich*, 126 Fed. 664; *U. S.* v. *N. Y. Central & H. R. R. Co.*, 146 Fed. 298; *U. S.* v. *Sager*, 49 Fed. (2d) 725, 727, 728; *U. S.* v. *Katz*, 271 U. S. 354, 355; *Gebardi* v. *U. S.*, 287 U. S. 112, 122; *U. S.* v. *Zeuli* (C. C. A. 2nd Circuit, decided August 2, 1943, presently unreported).

The leading case no doubt is the *Falcone* case. The Circuit Court of Appeals in the case at bar, appears to distinguish this as to the "druggists". The Fox petitioners concededly were not druggists, they were merely jobbers, namely, commission agents selling for the defendant Londoner, to the druggists who in turn sold to Liss. The distinction relied on by the Circuit Court of Appeals was that here, the conspiracy was to evade the statute and regulations forbidding sales unless made for medicinal purposes, unless made to consumers or registered dealers, and unless recorded. The Circuit Court of Appeals in the case at bar has said "There may be doubt whether the evidence proved that the conspiracy contemplated that the sales should not be recorded." The government's own witness Gitlitz (a member of the firm of Recro Drug Co. through which the Fox's operated) affirmatively stated that books of records

were kept (B. 447). Two of them in fact were in evidence (R. 321, 322). The other could not be found. At best there was simply the non-production of a record admittedly kept. Even the non-production was satisfactorily accounted for. There was a Marshals sale and in the confusion incident thereto the record was lost (R. 431, 448, 450, 451-454). No druggist was shown not to be registered although all the druggists as government witnesses took the stand and testified (R. 304-390). The manufacturer, Londoner, kept proper records of sale, see opinion of the Circuit Court of Appeals, page 907 of the record. The jobbers, his selling agents, the Fox petitioners were also registered (R. 447, 431). Liss was the only consumer. We have, therefore, simply a conspiracy to sell for non-medicinal purposes to a non-consumer to wit Liss. The Fox petitioners, the Circuit Court of Appeals has said, did not even know Liss and had no transactions with him. While the druggists may have sold to Liss and have conspired to violate statutes and regulations certainly the Foxes cannot be included in the conspiracy because they were no party to the sale. Title had passed from them before the druggists illegally resold. See *U. S.* v. *Byers*, 73 Fed. (2d) 419.

The sale to the druggists by and of itself was not criminal. If we join the Foxes and Londoner on account of the illegality of the resale we are in effect holding that if it is not a crime to sell an article but is a crime to resell it, nevertheless the seller is criminally responsible with the buyer because of his resale. Although it was illegal to make illicit alcohol, in the *Falcone* case the Court held that the seller of the sugar with which the illicit alcohol was manufactured could not be joined in a conspiracy with the manufacturer. Simply because it is illegal for a druggist to sell lead and opium wash to a consumer for a non-medicinal purpose how can the party through whom a legal sale to the druggist is made be joined in a conspiracy with

the druggist to resell it? Obviously we cannot charge the Foxes with guilty knowledge because of non-registry on their part or on the part of the purchasers who resold since such non-registry was not the fact nor can we so charge them because of not keeping records. All that remains therefore is quantity. This of itself has been held insufficient, see case of *Eckert* v. *U. S.*, 7 Fed. (2d) 257 and *Falcone* v. *U. S.* (*supra*).

The Circuit Court has termed the deals in which the sales were made from the Foxes to the druggists as "bizarre". There was merely a sales promotional scheme initiated by Londoner's concern whereby free goods were given with each sale of various items which sale included lead and opium wash (R. 304-390, 444-445). True the sales were beyond the normal requirements of the purchasers and they were told that returns could be made and returns were in fact made, but this was no concern of the Fox petitioners who were merely the salesman and not the sellers. The sales have also been termed "sham" by the Circuit Court. Of this there is absolutely no proof. All we have therefore is quantity. If because of quantity we can predicate guilty knowledge then perhaps we could adopt the terms of "sham" and "bizarre". This, however, is simply arguing in a circle. Even, however, though there is knowledge the *Falcone* case and other cases hereinbefore cited held in effect that knowledge is not enough. There must be participation in the end result.

C.

This was indeed a complex case, involving as it did a joinder of so many different conspiracies differing as to content as well as to personnel. In view of this it is submitted that the judge's charge (R. 779-801) colloquial, unenlightening and obscure as it was, was hopelessly inadequate to enable the jury, by a process of intelligent

discrimination, to arrive at a correct result. That a charge of this character constitutes reversable error and renders the trial unfair has frequently been held. See *People* v. *Odell,* 230 N. Y. 481, 487-488; *Kreiner* v. *U. S.,* 11 Fed. (2d) 722, 731; *Owen* v. *Owen,* 22 Iowa 270; *U. S.* v. *Quick,* 128 Fed. (2d) 832, 835.

It is appreciated that these appellants did not take full advantage of the inadequacy of the charge by making the proper requests and taking the proper exceptions. It is respectfully submitted however, that we may nevertheless now press the matter under Title 28, United States Code, Section 391 which provides as follows:

> "All United States Courts shall have power to grant new trials in cases where there has been a trial by jury, for reasons which new trials have usually been granted in the Courts of law. On the hearing of an appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the Court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties."

It has been held so consistently that points not raised upon a trial may be considered on appeal where injustice might otherwise result, that only a few authorities will be cited. *De Jianne* v. *U. S.,* 282 Fed. 737; *Moore* v. *U. S.,* 224 Fed. 95; *Keliher* v. *U. S.,* 193 Fed. 8.

In addition to the foregoing as heretofore pointed out the Judge's attitude throughout the trial was such that the same was unfair. In this connection we cite the following cases. *Adler* v. *U. S.,* 182 Fed. 464, 473, 472; *Frantz* v. *U. S.,* 62 Fed. (2d) 737. We also refer the Court to the discussion and Record pages hereinbefore set forth at page 5.

In connection with Subdivision C we also rely on many of the cases cited in the dissenting opinion of Judge FRANK and we cite therefrom the following: *Mattox* v. *U. S.*, 146 U. S. 840; *Wilmington Mining* v. *Fulton*, 205 U. S. 60; *Schilling* v. *Delaware & H. R. Corp.*, 114 Fed. (2d) 69; *Christian* v. *B. M. R. R.*, 109 Fed. (2d) 103, 105; *Wiborg* v. *U. S.*, 163 U. S. 632, 658; *U. S.* v. *Atkinson*, 297 U. S. 157, 160; *Brasfield* v. *U. S.*, 272, U. S. 448; *N. Y. C. R. Co.* v. *Johnson*, 279 U. S. 310, 318; *Crawford* v. *U. S.* 212 U. S. 183, 194; *Van Gordor* v. *U. S.*, 21 Fed. (2d) 939, 942; *Meadows* v. *U. S.*, 82 Fed. (2d) 881, 884. *In re Barnett*, 124 Fed. (2d) 1005; *U. S.* v. *St. Pierre*, 132 Fed. (2d) 837, 849; *Bruno* v. *U. S.*, 308 U. S. 287, 294; *Fort Dodge Hotel Co.* v. *Bartelt*, 119 Fed. (2d) 253, 259; *McCandless* v. *U. S.*, 298 U. S. 342, 347, 348.

Conclusion.

It is respectfully submitted that the questions raised in this case are of sufficient importance to require this Court to issue a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review its decision made herein.

Respectfully submitted,

MAX SCHWARTZ,
ALBERT LYONS,
Attorneys for Petitioners,
Offices respectively at
26 Court Street,
Brooklyn, N. Y.,
and
84 William Street,
New York City.

Appendix.

STATUTES

TITLE 18—UNITED STATES CODE

§ 88. (*Criminal Code, Section 37.*) *Conspiring to commit offense against United States.*—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

TITLE 26—UNITED STATES CODE (INTERNAL REVENUE CODE)

SUBCHAPTER A.—OPIUM AND COCA LEAVES

§ 2550. *Tax*—(a) *Rate.*

There shall be levied, assessed, collected, and paid upon opium, coca leaves, any compound salt, derivative, or preparation thereof, produced in or imported into the United States, and sold, or removed for consumption or sale, an internal revenue tax at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce. The tax imposed by this subsection shall be in addition to any import duty imposed on the aforesaid drugs.

§ 2551. *Exemptions*—(a) *Preparations of limited narcotic content.*

The provisions of this subchapter and part V of subchapter A of chapter 27 shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium, or more than one-

fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce; or to liniments, ointments, or other preparations which are prepared for external use, only, except liniments, ointments, and other preparations which contain cocaine or any of its salts or alpha or beta eucaine or any of their salts or any synthetic substitute for them: Provided, That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this subchapter and said part V: Provided further, That any manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies mentioned in this section lawfully entitled to manufacture, produce, compound, or vend such preparations and remedies shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Secretary shall direct.

Such record shall be preserved for a period of two years in such a way as to be readily accessible to inspection by any officer, agent or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officers named in section 2556, and every such person so possessing or disposing of such preparations and remedies shall register as required in section 3221 and, if he is not paying a tax under section 3220, he shall pay a special tax of $1 for each year, or fractional part thereof, in which he is engaged in such occupation, to the collector of the district in which he carries on such occupation as provided in part V of subchapter A of chapter 27.

§ 2553. *Packages*—(a) *General requirement.* It shall be unlawful for any person to purchase, sell, dispense, or dis-

tribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any persons who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

§ 2554. *Order forms*—(a) *General requirement.* It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

(c) (2) *Prescriptions.*

To the sale, dispensing, or distribution of any of the drugs mentioned in section 2550(a) by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under section 3221: *Provided, however,* That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: *And provided further,* That such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials mentioned in section 2556.

(d) *Preservation.* Every person who shall accept any order required under subsection (a), and in pursuance

thereof shall sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a), shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section 2556.

(f) *Supply.* The Secretary shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors for sale by them to those persons who shall have registered and paid the special tax as required by sections 3221 and 3220 in their districts, respectively; * * *.

(g) *Unlawful use.* It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession. § 2557.

* * * * *

(b) *Violations in general.*

(1) Any person who violates or fails to comply with any of the requirements of this subchapter or part V of subchapter A of chapter 27, shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court.

(2) Any person required under this subchapter or section 3220 to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter or section 3220, who wilfully fails to pay

such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

§ 3220. *Tax.*

On or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof shall pay the special taxes hereinafter provided. Every person upon first engaging in any of such activities shall immediately pay the proportionate part of the tax for the period ending on the following June 30.

(a) *Importers, manufacturers, or producers.*

Importers, manufacturers, producers, or compounders, lawfully entitled to import, manufacture, produce, or compound any of the aforesaid drugs, $24 per annum;

(b) *Wholesale dealers.*

Wholesale dealers, lawfully entitled to sell and deal in any of the aforesaid drugs, $12 per annum;

(c) *Retail dealers.*

Retail dealers, lawfully entitled to sell and deal in any of the aforesaid drugs, $3 per annum;

(e) *Persons engaged in research, instruction, or analysis.*

Persons not registered as an importer, manufacturer, producer, or compounder and lawfully entitled to obtain

and use in a laboratory any of the aforesaid drugs for the purpose of research, instruction, or analysis shall pay $1 per annum, but such persons shall keep such special records relating to receipt, disposal, and stocks on hand of the aforesaid drugs as the Commissioner of Narcotics, with the approval of the Secretary, may by regulation require. Such special records shall be open at all times to the inspection of any duly authorized officer, employee, or agent of the Treasury Department.

(f) *Persons not otherwise taxed.*

For a tax of $1 a year on persons not otherwise taxed, dispensing preparations and remedies of limited narcotic content, see section 2551 (a).

§ 3221. *Registration*—(a) *Requirements.*

On or before July 1 of each year every person who engages in any of the activities enumerated in section 3220 shall register with the collector of the district his name or style, place of business and place or places where such business is to be carried on, and every person upon first engaging in any such activities shall immediately make like registration.

§ 3224. *Unlawful acts in case of failure to register and pay special tax*—(a) *Trafficking.*

It shall be unlawful for any person required to register under the provisions of this part or section 2551 (a) to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this part, or section 2551 (a).

(b) *Transportation.*

It shall be unlawful for any person who shall not have registered and paid the special tax as required by sections

3220 and 3221 to send, ship, carry, or deliver any of the aforesaid drugs from any State or Territory or the District of Columbia, * * *.

(c) *Possession.*

It shall be unlawful for any person who has not registered and paid the special tax as provided for by this part or section 2551 (a), to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this subsection and subsection (a), and also a violation of the provisions of sections 3220 and 3221 * * *.

REGULATIONS

(Treasury Regulations No. 5 [1938], relating to the "Importation, Manufacture, Production, Compounding, Sale, Dealing in, Dispensing and Giving Away of Opium or Coca Leaves or any Compound, Manufacture, Salt, Derivative, or Preparation thereof.")

Art. 3. *Persons liable.*—Liability to payment of special tax and registration attaches to every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, administers, or gives away narcotics. As to the tax rates applicable to a person engaged in one or more of the foregoing activities see Article 13.

Art. 15. *Manufacturers and compounders.*—As a general rule, every person who, by compounding, mixing, or other process of manufacture, produces narcotic drugs or preparations for sale or distribution is subject to tax as a manufacturer or compounder at $24 per annum in Class I, with the following exceptions as to retail dealers:

* * * * *

Art. 25. *Partnerships.*—A partnership is subject to the same tax liability as an individual. Should either of the partners also individually engage in a taxable activity, he will incur additional liability with respect to such activity.

* * * * *

Art. 62. *Written order required.*—Except as otherwise provided, order forms are required for all sales or other dispositions of narcotic drugs.

* * * * *

Art. 90. *When not required.*—The use of order forms is not required:

* * * * *

(5) For the sale, disposition, giving away, dispensing, or possession of preparations and remedies which do not contain more than 2 grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than 1 grain of codeine, or any salt or derivative of any of them in 1 fluid ounce, or, if a solid, or semisolid preparation, in 1 avoirdupois ounce or of liniments, ointments, or other preparations which are prepared for external use only, except liniments, ointments, and other preparations which contain cocaine, or any of its salts or alpha or beta eucaine or any of their salts or any synthetic substitute for them, provided that such remedies and preparations are manufactured, sold distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this Act and that a record of dispositions is kept as required by Article 185.

* * * * *

Art. 167. *Purpose of issue.*—A prescription, in order to be effective in legalizing the possession of unstamped narcotic drugs and eliminating the necessity for use of order forms, must be issued for legitimate medical purposes. The

responsibility for the proper prescribing and dispensing of narcotic drugs is upon the practitioner, but a corresponding liability rests with the druggist who fills the prescription. An order purporting to be a prescription issued to an addict or habitual user of narcotics, not in the course of professional treatment but for the purpose of providing the user with narcotics sufficient to keep him comfortable by maintaining his customary use, is not a prescription within the meaning and intent of the act; and the person filling such an order, as well as the person issuing it, may be charged with violation of the law.

* * * * *

Art. 182. *Restrictions on dispositions.*—A preparation conforming to the standards set out in Article 181 is exempt from stamp tax and the requirements pertaining to taxable narcotics only when manufactured, sold, distributed, given away, dispensed, or possessed as a medicine. A manufacturer may produce and sell as exempt only preparations readily capable of use for claimed medicinal purposes, and sales thereof, if not to consumers, shall be made only to persons registered in Class V. Sales made to consumers, either by manufacturers or dealers shall be made only in such quantities and with such frequency to the same purchaser as will restrict their use to the medicinal purpose for which intended.

* * * * *

Art. 183. *Dispositions to dealers.*—Orders for exempt preparations except where sold to a registrant in Class VI are not required to be on any particular forms, but an order from a dealer shall not be honored by a manufacturer or other dealer unless it bears the registry number of the dealer giving the order.

* * * * *

Art. 185. *Records required.*—Every manufacturer, producer, compounder, or vendor (including dispensing physi-

cians), of exempt preparations shall record all sales, exchanges, gifts, or other dispositions, the entries to be made at the time of delivery. Separate records shall be kept of dispositions to registrants and of dispositions to consumers. The record of dispositions to registrants shall how the name, address, and registry number of the registrant to whom disposed, the name and quantity of the preparation, and the date upon which delivery to the registrant, his agent or a carrier is made. The record of dispositions to consumers shall show the name of the recipient, his address, the name and quantity of the preparation, and the date of delivery.

Art. 201. *Records open to inspection.*—Any officer, agent, or employee of the Treasury Department * * * authorized to enforce the act, * * * shall have authority to examine the books, papers, and records kept pursuant to these regulations, and may require the production thereof.

All order forms, duplicate forms, prescription records, returns, and inventories required under the act or these regulations to be kept on file shall be kept so that they can be readily inspected.

* * * * *

(17)

Office - Supreme Court, U. S.
FILED
AUG 24 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term—1943.

No. 287

DAVID LOWENSTEIN,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

CHARLES B. HALLEY,
Counsel for Petitioner.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

INDEX.

	PAGE
Petition	1
Summary Statement of Matter Involved	1
Questions Presented	3
Reasons Relied on for the Allowance of the Writ	3
Brief in Support of the Petition	7
Opinions of the Court Below	7
Grounds Upon Which the Jurisdiction of This Court Is Invoked	7
Statement of the Case	8
Specifications of Errors	8
Summary of the Argument	9
Argument	10
I.—Prejudicial variance existed between the single conspiracy charged in the indictment and the crimes established by the evidence	10
II.—The trial court's concededly obscure charge and its erroneous refusal to accept requests to charge were substantially prejudicial to the rights of petitioner and cannot be assumed to be harmless error	12
III.—The petitioner was deprived of his liberty without due process of law by	13

PAGE

A. The Government's use on appeal of a different theory from the one on which the case was tried in the court below .. 13

B. The Trial Judge's conduct throughout the course of the trial and the United States Attorney's prejudicial comments 15

IV.—Petitioner's sales of lead wash, even though he may have suspected that it might be put to illegal use, is insufficient ground on which to sustain a verdict of guilt 19

Conclusion 20

Appendix A 21

Appendix B 21

Appendix C 22

Appendix D 22

CASES CITED.

	PAGE
Berger v. U. S., 295 U. S. 78 (1935)	9, 10
Betts v. Brady, 316 U. S. 455, 462	15
Bruno v. U. S. 308 U. S. 287	5, 12
Fillippon v. Albion Vein Slate Co., 250 U. S. 76	5
Fort Dodge Hotel Co. v. Bartelt, 119 Fed. 2nd, 253, 259	5, 12
Hickory v. U. S., 160 U. S. 408	5
Keller v. Brooklyn Bus Corp., 128 Fed. 2nd, 519	4
McCandless v. U. S., 298 U. S. 342, 347-348	4, 12
Starr v. U. S., 153 U. S. 614	5
United States of America, Appellee v. Jack Liss, et al., Appellants	6
U. S. v. Falcone, 311 U. S. 205	10, 19
U. S. v. River Rouge, 269 U. S. 411	5

STATUTES CITED.

Judicial Code of the United States, Title 28 U. S. Code, Section 347, Subdivision a (Judicial Code, Section 240a as Amended)	21
Constitution of the United States, Amendment V	21
Chapter 28, U. S. C. A., Section 391	22
Title 26, U. S. Code, Section 2551a	22

IN THE

Supreme Court of the United States

OCTOBER TERM—1943.

DAVID LOWENSTEIN, *Petitioner,* AGAINST UNITED STATES OF AMERICA, *Respondent.*	No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, David Lowenstein, respectfully represents the following:

I.—Summary Statement of Matter Involved.

Petitioner was convicted by a jury after a trial in the United States District Court for the Southern District of New York upon an indictment, (R. 4-11) charging him and others with having conspired to violate the provisions of the Internal Revenue Code regulating the sale and dispensing of narcotic drugs.

Petitioner, David Lowenstein, was sentenced to serve a term of three months and to pay a fine of $200 (R. 817). *Petitioner served his full prison term and paid the full amount of his fine.*

Petitioner appealed to the United States Circuit Court of Appeals for the Second Circuit upon various grounds.

The Circuit Court in a majority opinion (R. 898-910) by Mr. Justice Hand, concurred in by Mr. Justice Swan, affirmed the conviction as to all the appellants except Palmer, Geffner, and Jaffe. Mr. Justice Frank, in a separate opinion, dissented and held for reversal of the conviction and the dismissal of the indictment as to all the defendants except Liss and Conte.

Upon motion for re-argument made by the appellant, David Rudy, the Circuit Court of Appeals reversed the verdict of conviction as to Rudy in a *per curiam* opinion (R. 932).

The Circuit Court of Appeals in the majority opinion divided the alleged conspiracy into three separate conspiracies, to wit: 1st. The attempted synthesis of morphine which they decided was not illegal and which they disregarded (R. 900); 2nd. The extraction of the narcotic base from certain exempt preparations of limited narcotic content which they decided failed and was abandoned (R. 900); 3rd. The attempted diversion of opium by the circuitous circulation of lead and opium wash which the Court decided was not proved (R. 900-901). The Circuit Court of Appeals however, proceeded to affirm the conviction by holding that the Government did not attempt on appeal to sustain the conviction on the latter theory but on the theory that the Government had proved a conspiracy to evade the regulations governing the sale of preparations of limited narcotic content, Section 2551-a Title 26, U. S. Code (R. 901). Mr. Justice Frank in a dissenting opinion held that the variance between the single conspiracy set forth in the indictment and the proof

of three separate conspiracies coupled with the obscure and unenlightening charge of the trial court was substantial error (R. 910-913).

II.—Questions Presented.

I.—Whether the proof of several distinct conspiracies instead of the single one alleged, and the submission of multiple and complex issues involving numerous defendants prejudiced the consideration of petitioner's case by the jury and constituted fatal variance.

II.—Whether the Trial Judge's obscure charge and his refusal to accept requests to charge, conceded to be error by the Circuit Court of Appeals, were substantially prejudicial to petitioner under Section 269 of the Judicial Code as amended (Chapter 28, U. S. C. A., Section 391) and must, therefore, be presumed to be harmful.

III.—Whether the petitioner has been deprived of his liberty without due process of law by reason of

(a) the Government's substitution of an entirely new theory of guilt for the first time on appeal.

(b) The prejudicial manner of the trial Judge in and during the conduct of the trial and the prejudicial remarks of the United States Attorney.

IV.—Whether a retail druggist can be convicted as a co-conspirator merely because he suspected the legality of certain sales of exempt preparations without proof that he had any knowledge of the existence of the conspiracy or that he in any way had a stake in its outcome.

III.—Reasons Relied on for the Allowance of the Writ.

I.—This case involves an important question affecting the law of criminal conspiracy. The evidence showed, and

it was conceded by the Circuit Court, that the Government proved three separate conspiracies instead of the single conspiracy set forth in the indictment (R. 900). This petitioner was admittedly not connected in any way with either the first or second conspiracies. The Circuit Court in violation of its own concessions that three separate conspiracies existed held that this was not a harmful variance and affirmed the conviction. Petitioner contends that the trial court's admission of evidence as to three separate conspiracies was reversible error since it could be used cumulatively against any of the defendants, especially since both the Trial Court and the Circuit Court conceded that the first conspiracy, to wit: the attempted synthesis of morphine was not illegal; that the second conspiracy, to wit: the attempted extraction of the narcotic base from preparations of limited narcotic content failed and was abandoned; and that the third conspiracy, to wit: the attempted diversion of opium by the circuitous circulation of lead and opium wash was never proved. The Circuit Court's admission of such variance therefore warranted a reversal of conviction. Petitioner believes that the holding of the Circuit Court seriously affects the judicial administration of criminal law and materially prejudices the trial of a defendant.

II.—There is a diversity of opinion between the Circuit Courts of Appeals for the Second Circuit and the Eighth Circuit as to whether or not conceded error should be presumed to be harmless and therefore disregarded as not substantially prejudicial. The Second Circuit seems to be disinclined to follow the trend initiated by the Supreme Court in the case of *McCandless* v. *U. S.*, 298 U. S. 342, 347-348. In the case at Bar, the Second Circuit seems to hold that the modern disposition is to assume that error has been harmless. (Also see *Keller* v. *Brooklyn Bus Corp.*, 128 Fed. 2nd, 519.) The Eighth Circuit in *Fort*

Dodge Hotel Co. v. *Bartelt*, 119 Fed. 2nd, 253, 259, holds that error to the substantial rights of a party is grounds for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial. The Supreme Court has likewise similarly held in many cases. *Bruno* v. *U. S.*, 308 U. S. 287; *U. S.* v. *River Rouge*, 269 U. S. 411; *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76.

III.—The Circuit Court of Appeals for the Second Circuit has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court in that the Circuit Court of Appeals has affirmed a judgment of conviction and sentence of imprisonment wherein, tested by an appraisal of the decisions in *Hickory* v. *U. S.*, 160 U. S. 408; *Starr* v. *U. S.*, 153 U. S. 614, and innumerable other Supreme Court decisions, the petitioner was deprived of his liberty without due process of law.

IV.—This case involves another important question affecting the law of criminal conspiracy which was decided by the Circuit Court of Appeals in a way probably not in accord with applicable decisions of the Supreme Court. The evidence showed that petitioner was a retail druggist who sold a small quantity of lead wash to one of the other defendants. There is no proof that petitioner knew of the existence of an illegal conspiracy or of the unlawful purpose to which the lead wash might be applied. The Circuit Court sustained petitioner's conviction on the ground that he must have suspected that there was something unlawful about it. Petitioner contends that the Circuit Court erred in holding that mere suspicion of the unlawfulness of the use to which the lead wash might be put was sufficient to sustain a conviction. Petitioner believes that the holding of the Circuit Court seriously affects the judicial administration of criminal law and materially prejudices the trial of a defendant.

Wherefore, your petitioner prays that writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit directing said Court to certify and send to this Court a full and complete transcript of the record and the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, calendar #223, *United States of America, Appellee* v. *Jack Liss, et al., Appellants,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that judgment herein of said Circuit Court of Appeals be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Dated: August 20, 1943.

DAVID LOWENSTEIN,

By CHARLES B. HALLEY,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM—1943.

DAVID LOWENSTEIN,
Petitioner,

AGAINST

UNITED STATES OF AMERICA,
Respondent.

No.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.—Opinions of the Court Below.

There was no opinion rendered by the Trial Court relating to the within petitioner. The opinions of the Circuit Court below (R. 898-918) rendered May 28, 1943 are still unreported. The *per curiam* opinion of the Circuit Court granting the motion for reargument with respect to the defendant Rudy has not as yet been officially reported but appears in the record (R. 932).

II.—Grounds Upon Which the Jurisdiction of This Court Is Invoked.

A. The United States Circuit Court of Appeals for the Second Circuit made its order for mandate herein on August 3, 1943 (R. 933).

B. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. Code, Section 347 sub-division a (Judicial Code, Section 240a as amended) and Rule 38 of Revised Rules, 1939, of the Supreme Court of the United States.

C. The Circuit Court affirmed a conviction and judgment of sentence of imprisonment in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States. The jurisdiction of this Court is invoked pursuant to said Fifth Amendment to the Constitution of the United States.

D. The reasons stated in the preceding petition, under III (pp. 3 to 5), herewith adopted and made a part of this brief, are believed to constitute good grounds for invoking the jurisdiction of this Court.

III.—Statement of the Case.

A statement of the case has been made in the preceding petition under I (pp. 1-3) which is hereby adopted and made a part of this brief.

IV.—Specifications of Errors.

A. The Circuit Court erred in holding that there was no fatal variance between the conspiracy charged in the indictment and the proof offered on trial (R. 902-904).

B. The Circuit Court erred in holding that the Trial Court's concededly obscure charge and its refusal to accept requests to charge did not prejudice the substantial rights of the petitioner but that such error is presumed harmless (R. 904-906).

C. The Circuit Court erred in permitting the Government to use on appeal a different theory from the

one on which the case was tried in the Court below, to wit: The substitution of the theory that the petitioner had conspired to violate Section 2551a of the Internal Revenue Code in place of what appeared to be the original theory (R. 900-901), that the petitioner had conspired to circulate lead wash in an attempt to divert opium which was to be sold in the underworld. The Circuit Court erred in holding that the conduct of the Trial Judge and the remarks of the United States Attorney were not prejudicial to the rights of petitioner (R. 904-905).

D. The Circuit Court erred in holding that mere suspicion of the unlawfulness of the use to which the lead wash might be put was sufficient ground for sustaining the petitioner's conviction.

Summary of the Argument.

A. Prejudicial variance existed between the single conspiracy charged in the indictment and the crimes established by the evidence. Application of the rule in *Berger* v. *U. S.*, 295 U. S. 78 (1935) required the granting of petitioner's motion made in the trial court to dismiss the indictment, to acquit the petitioner and to set aside the verdict.

B. Petitioner has the right to take advantage of Chapter 28, U. S. C. A., Section 391. The Trial Judge's charge was admittedly obscure and unenlightening and was prejudicial to the substantial rights of the petitioner. The Trial Court's erroneous refusal to accept requests to charge was prejudicial to the substantial rights of the petitioner. That all of these errors on the part of the Court cannot be presumed harmless.

C. It is a universally accepted rule of law that a case may not be tried on one theory in the Court below and

on another theory in an Appellate Court. The protection afforded a defendant in a criminal proceeding by the Due Process Clause of the Fifth Amendment to the Constitution was violated by the trial judge's persistent and prejudicial conduct throughout the course of the trial and the United States Attorney's comment on the failure of the petitioner to call character witnesses.

D. One who sells a preparation suspecting that it may be used for an unlawful purpose, but not knowing of a conspiracy to commit a crime, is not chargeable as a co-conspirator. Application of the rule in *U. S.* v. *Falcone,* 311 U. S. 205, required the granting of petitioner's motion to dismiss the indictment, to acquit the petitioner, and to set aside the verdict respectively made in the Trial Court.

ARGUMENT.

I.

Prejudicial variance existed between the single conspiracy charged in the indictment and the crimes established by the evidence.

Application of the rule stated in *Berger* v. *U. S.,* 295 U. S. 78 (1935) required the granting of petitioner's motions at the trial based on such variance. The Circuit Court in its opinion (R. 900, 902) held that, contrary to the all embracing indictment, the following three conspiracies were revealed by the evidence at the trial: (1) the attempted synthesis of morphine; (2) the attempted extraction of the narcotic base from preparations of limited narcotic content; and (3) the attempted diversion of opium by a circuitous circulation of lead and opium wash.

The first conspiracy concededly was not illegal (R. 900). Both the trial court and the Circuit Court admit-

ted that there was nothing illegal in an attempt to synthesize morphine out of harmless drugs (R. 800, 900). The second conspiracy was admitted by the Circuit Court to have been abandoned (R. 900). The third conspiracy was never proved (R. 900-901).

The Supreme Court has indicated in the *Berger* case that a variance is fatal only if prejudice be established. In the instant case the trial court admitted evidence in proof of the first conspiracy which was concededly a perfectly legal enterprise and with which it is conceded petitioner had no connection. The court also admitted evidence in proof of the second conspiracy with which likewise it was conceded that the petitioner had no connection. The admission of such evidence undoubtedly prejudiced the jury because of the volume of testimony admitted in proof of its purportedly illegal nature (R. 29-240) and because it charged the atmosphere of the court with its spectacular quality. This not only predisposed the jury unfavorably to the petitioner, but served to convince them of his criminal conduct, especially when coupled with the evidence adduced in connection with the third conspiracy. Taken cumulatively, all this testimony, constituting about one-third of the trial, served to completely submerge the jury and would have persuaded any jury of the guilt of petitioner. This may not have been true had he been tried separately upon the third conspiracy, the only conspiracy, if any, with which he could have been even remotely connected.

The prejudicial nature of the variance should be considered, together with the length of the trial, the numerous transactions covered, and the number of defendants. The general character of evidence adduced, the highly inflammatory nature of the testimony against the other defendants, the jumble of names, places, and dates, all contributed to the prejudice of petitioner's trial. Motions

made in the trial court based on the variance between proof offered and that charged in the indictment should have been granted.

II.

The trial court's concededly obscure charge and its erroneous refusal to accept requests to charge were substantially prejudicial to the rights of petitioner and cannot be assumed to be harmless error.

The Circuit Court, both in the majority and dissenting opinions, concedes that the charge was in all respects obscure and unenlightening; that it did not advise the Jury of the issues they were to decide and that the wilderness of the trial court's resulting verbiage must have left the Jury pretty much in the dark (R. 905). Despite its admission of the inadequacies of the charge, the Circuit Court proceeded to dispose of this obvious error by reasoning that the modern disposition seems to assume that an error has been harmless (R. 906). This is opposed to the trend initiated by the Supreme Court in the case of *McCandless* v. *U. S.*, 298 U. S. 342, 347-348 and followed by the Eighth Circuit in the case of *Fort Dodge Hotel Co.* v. *Bartelt,* 119 Fed. 2nd 253, 259. The Circuit Court did not decide this question on the ground that the petitioner failed to take exception to the trial court's charge, but apparently conceded that the petitioner had the right, under Chapter 28, U. S. C. A., Section 391, to take advantage of such error for the first time on appeal.

The Circuit Court's disposition of this question, therefore, rests solely on the ground that such error will be assumed to be harmless. The Circuit Court's refusal to follow the trend now clearly delineated in the *McCandless* case, *supra,* in *Bruno* v. *U. S.*, 308 U. S. 287, 294, and followed by the Eighth Circuit in *Fort Dodge Hotel Co.*

v. *Bartelt, supra,* has resulted in a decision in conflict with the decision of another Circuit Court on the same question and in apparent violation of the rule laid down by the Supreme Court.

Mr. Justice Frank in the dissenting opinion was in vehement disagreement with the subjective conclusions of the majority that this error was harmless (R. 917-918).

The same reasoning holds with respect to the trial court's refusal to accept requests to charge.

III.

The petitioner was deprived of his liberty without due process of law by

A. The Government's use on appeal of a different theory from the one on which the case was tried in the court below.

B. The Trial Judge's conduct throughout the course of the trial and the United States Attorney's prejudicial comments.

A. *The Government's use on appeal of a different theory from the one on which the case was tried in the court below.*

That a case may not be tried on one theory in the Court below and on another theory in an Appellate Court is a principle of law so fundamental and so universal that no citation of authority is necessary.

The Circuit Court decided that three separate conspiracies were shown to have existed rather than the single conspiracy alleged in the indictment (R. 900-901). The Circuit Court in the majority opinion conceded that the Government failed to prove that the petitioner was

engaged in circulating lead wash according to a preconceived plan by which he attempted to divert quantities of opium to be sold in the underworld (R. 900-901). The opinion went on to state however, that the Government was not *now* seeking to maintain the conviction on that theory, but that the Government was asserting on appeal that it had proved a conspiracy to violate the regulations governing the sale of preparations of limited narcotic content, Section 2551a, Title 26, U. S. Code (R. 901).

A reading of the indictment, however, fails to show precisely which of the allegations pertains to which of the conspiracies. It is difficult to determine which Sections of the Internal Revenue Code were being violated by which of the conspiracies. Moreover, the United States Attorney in his opening remarks stated that the Government would prove that the petitioner was engaged in illicitly circulating lead wash in order to divert opium which was to be illegally sold. Despite this statement by the United States Attorney of the government's theory of action with respect to the lead wash conspiracy, and despite the fact that it decided that there were three separate conspiracies, the Circuit Court of Appeals, nevertheless, permitted the Government to assert on appeal a theory of guilt based solely on the sale by the petitioner of a small quantity of lead wash which it now asserted was proved on the trial to be in violation of Section 2551-a of the Internal Revenue Code.

The Circuit Court *presumed* the illegal nature of the conspiracy without first *determining* that an illegal plan existed. It failed to determine, moreover, whether, if this conspiracy had been tried separately under the original theory of the Government, a verdict of guilt could be sustained. The problem is further complicated by the fact that it is impossible to determine whether the Government would have tried this single conspiracy on the theory that it asserted on appeal, or whether it would have tried

the petitioner on the original theory. The Circuit Court therefore erred in either refusing or failing to discuss this question and to decide it.

It is respectfully submitted that it was a violation of the Due Process Clause to deprive the petitioner of his liberty by permitting the United States Government to frame an indictment in vague, obscure, and general terms, purporting to allege one conspiracy, but in reality alleging three separate conspiracies; by not informing him of the precise nature of the crime with which he was charged; by not having the issues at the trial clearly defined; by confronting him on appeal with an entirely different theory of guilt—which is tantamount to a trial without a Jury; and by the Circuit Court's refusal to clarify and decide the sufficiency of the Government's proof with respect to this concededly separate and distinct conspiracy.

B. *The Trial Judge's Conduct Throughout the Course of the Trial and the United States Attorney's Prejudicial Comments.*

The Court has recently said that the guaranty of due process is not formulated in a set of hard and fast rules but that "Asserted denial is to be decided by an appraisal of the totality of facts in a given case." (*Betts* v. *Brady*, 316 U. S. 455, 462.) Despite the standard recognized by this Court, the record in this case discloses a conviction which was the result of a trial conducted in a manner highly prejudicial to the fundamental guarantees which underlie our judicial system.

Throughout the trial lasting a number of days, the District Judge was quite evidently convinced of the guilt of the accused and took no pains to avoid disclosure of this fact to the Jury. In his examination and cross-examination of witnesses, in remarks in the presence of the Jury, in opinions expressed as to other elements of testi-

mony and the frequent reiteration of certain questions, the trial Judge departed from that attitude of disinterestedness which is regarded as the very foundation of a fair and impartial trial. This petition would be unnecessarily lengthened by quotations from the record of the Trial Judge's animatedly prejudicial conduct.

For instances where the Trial Judge ridiculed the defense counsel, failed to accord them the respect to which they were entitled as members of the Bar, and implicitly threatened them with contempt, pre-disposing the Jury unfavorably toward the petitioners, see: R. 54, 79-80, 89, 232, 109-110, 247-249, 356, 378, 540-541, 505, 556-557, 570-571.

There are many instances in the record where the Trial Court manifested an apparent desire to assist the prosecution and to put into the mouths of the witnesses words which were unfavorable to the petitioner's case. Examples of this appear at R. 274-275, 314, 347, 354-355, 442, 443, 491, 268-269.

The Court's insistent efforts to connect the defendants in a conspiracy, its frequent and unnecessary interruptions of both direct and cross-examinations that were being competently conducted, all conveyed to the jury the impression that the Court was insisting upon a conviction. See R. 338, 460, 496, 165, 169, 160-162, 164, 167, 168, 170, 171, 172-173, 174, 259, 270-1, 311, 343-4, 346, 362, 363, 374, 375, 379, 448, 455, 457, 471, 478, 535, 536, 546, 547, 552-3 and 565.

The Court, in many instances failed to safeguard the rights of the defendants, by ignoring the objections made by counsel and failing to rule on the propriety of the questions asked by the United States Attorney. See R. 203, 206, 455-456.

The unfavorable impression undoubtedly left upon the jury by the Court's obvious prejudice was intensified by the United States Attorney's indulgence in bits of sar-

casm, as to which the Court neglected to reprimand him as it never failed to do in the case of defense counsel. See R. 353-7, 206, 247, 535.

In his summation, the United States Attorney made some comment, which is not revealed in the record, upon the fact that some of the defendants produced evidence of good reputation, *whereas others, including this petitioner,* did not. Upon objections being made the following colloquy took place (R. 777-778):

> "Mr. Butler: I hate at this time to interrupt Mr. Cannella, but that is the third time he has talked about the obligations of the defense.
>
> The Court: He did not say there is any obligation. There is not any obligation.
>
> Mr. Butler: He insinuated that we should produce character witnesses.
>
> The Court: Oh, no, not at all.
>
> Mr. Butler: That is the third time, your Honor, he said it, and I think you should instruct the jury that we are under no obligation to produce any witnesses whatsoever.
>
> The Court: No; but when you put in a defense you can call character witnesses if you wish. You are not obligated. Of course not.
>
> Mr. Butler: Your Honor knows that no one can comment on the failure to put in defense.
>
> The Court: No one is commenting on the failure to put in a defense. He is referring to these defendants who took the stand only, and those are the only ones he is referring to.
>
> Mr. Butler: He specifically referred to it. He said one defendant produced a character witness and the others did not.
>
> The Court: There was no reference to any defendant who did not take the stand.

Mr. Butler: Your Honor, may I read for the record exactly——

The Court: There has been no reference to any defendants who did not take the stand.

Mr. Butler: May I read his exact words?

The Court: Do not interrupt. You can refer to it later.

Mr. Butler: He said the only character witness called——

The Court: Do not interrupt. You may reserve that for later."

It is quite evident that the Court completely misunderstood the point being made by counsel. The least that the Trial Judge could have done was to instruct the jury with respect to the legal presumption of innocence enjoyed by each of the defendants, and that their failure to produce evidence in proof of their good character in no way reflected upon their guilt.

It is respectfully submitted that the United States Attorney's comment was highly prejudicial, and that the Court's failure to eradicate the unfavorable impression created on the jury not only by the United States Attorney's remarks but by the Court's supporting them was error.

Petitioner bases this application and the proposed appeal to this Court upon the vehement contention that the prosecutor, assisted and encouraged by the trial judge conducted the entire proceeding in a manner designed to and resulting in a mandate to the jury to convict this petitioner, all in violation of petitioner's right to a fair trial under the Due Process Clause of the Fifth Amendment to the Constitution.

IV.

Petitioner's sales of lead wash, even though he may have suspected that it might be put to illegal use, is insufficient ground on which to sustain a verdict of guilt.

The gist of the offense of conspiracy as defined by Section 37 of the Criminal Code, 18 U. S. C., Section 88, is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. The record fails to reveal any evidence tying this petitioner up with any agreement to commit an offense. All that the evidence shows is that petitioner sold a quantity of lead wash to one of the other defendants and that he was apprehensive as to the legality of such sales and sought to determine whether such sales were legal. The Circuit Court in the majority opinion held that it was a fair inference that petitioner must have at least suspected, in view of the highly regulated character of the industry, that there was something unlawful about it.

Petitioner contends that suspicion on his part that lead wash sold might be used for an illegal purpose was not sufficient to prove that he made himself a part of an illegal plan to commit an offense or to defraud the United States.

Under the holding in *U. S.* v. *Falcone*, 311 U. S. 205, before one can be found guilty of being a co-conspirator, it must be shown that he knew of the existence of the conspiracy and intended to make himself a part of it. Mere knowledge that goods which he sells may be put to an illegal use is insufficient.

It is respectfully submitted that the Circuit Court's inference of petitioner's guilt is entirely unjustified and

that such a holding seriously affects the judicial administration of criminal law and materially prejudices the trial of a defendant.

Conclusion.

It is respectfully submitted that the questions raised in this case are of sufficient importance to request this Court to issue a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review its decision made herein.

CHARLES B. HALLEY,
Counsel for Petitioner.

APPENDIX A.

Judicial Code of the United States, Title 28 U. S. Code, Section 347, Subdivision a (Judicial Code, Section 240a as Amended).

In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

APPENDIX B.

Constitution of the United States, Amendment V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation.

APPENDIX C.

Chapter 28, U. S. C. A., Section 391.

All United States Courts shall have power to grant new trials in cases where there has been a trial by jury, for reasons which new trials have usually been granted in the Courts of law. On the hearing of an appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the Court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties.

APPENDIX D.

Title 26, U. S. Code, Section 2551a.

§2551. *Exemptions*—(a) *Preparations of limited narcotic content.*

The provisions of this subchapter and part V of subchapter A of chapter 27 shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce; or to liniments, ointments, or other preparations which are prepared for external use, only, except liniments, ointments, and other preparations which contain cocaine or any of its salts or alpha or beta eucaine or any of their salts or any syn-

thetic substitute for them: Provided, That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this subchapter and said part V: Provided further, That any manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies mentioned in this section lawfully entitled to manufacture, produce, compound, or vend such preparations and remedies, shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Secretary shall direct.

Such record shall be preserved for a period of two years in such a way as to be readily accessible to inspection by any officer, agent or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officers named in section 2556, and every such person so possessing or disposing of such preparations and remedies shall register as required in section 3221 and, if he is not paying a tax under section 3220, he shall pay a special tax of $1 for each year, or fractional part thereof, in which he is engaged in such occupation, to the collector of the district in which he carries on such occupation as provided in part V of subchapter A of chapter 27.

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Argument	16
Conclusion	32
Appendix	33

CITATIONS

Cases:

Adler v. *United States*, 182 Fed. 464, certiorari denied, 223 U. S. 733 — 30

Berger v. *United States*, 295 U. S. 78 — 20, 31

Blumenthal v. *United States*, 88 F. (2d) 522 — 20, 21

Braverman v. *United States*, 317 U. S. 49 — 19, 22

Caringella v. *United States*, 78 F. (2d) 563 — 22

Chadwick v. *United States*, 117 F. (2d) 902, certiorari denied, 313 U. S. 585 — 21

Cooper v. *United States*, 91 F. (2d) 195 — 21

Craig v. *United States*, 81 F. (2d) 816, certiorari denied, 298 U. S. 690 — 26

Cusmano v. *United States*, 13 F. (2d) 451, certiorari denied, 273 U. S. 773 — 30

Davis v. *United States*, 12 F. (2d) 253, certiorari denied, 271 U. S. 688 — 22

Direct Sales Co., Inc., v. *United States*, No. 593, October Term, 1942, decided June 14, 1943 — 25, 26, 27, 28

Dunlop v. *United States*, 165 U. S. 486 — 32

Fabian v. *United States*, 15 F. (2d) 696 — 31

Frantz v. *United States*, 62 F. (2d) 737 — 30

Galatas v. *United States*, 80 F. (2d) 15, certiorari denied, 297 U. S. 711 — 26

Horning v. *District of Columbia*, 254 U. S. 135 — 30

Lowdon v. *United States*, 149 Fed. 673, certiorari denied, 210 U. S. 434 — 32

Marcante v. *United States*, 49 F. (2d) 156 — 19

Martin v. *United States*, 100 F. (2d) 490, certiorari denied, 306 U. S. 649 — 26

Cases—Continued. Page

McDonnell v. *United States*, 19 F. (2d) 801, certiorari denied, 275 U. S. 551 26
McNight v. *United States*, 97 Fed. 208 32
Meyers v. *United States*, 3 F. (2d) 379 21
Morris v. *United States*, 123 F. (2d) 957 19
Nelson v. *United States*, 298 Fed. 93 19
Oliver v. *United States*, 267 Fed. 544 19
Pointer v. *United States*, 151 U. S. 396 21
Pollard v. *United States*, 261 Fed. 336, certiorari denied, 252 U. S. 577 32
Silkworth v. *United States*, 10 F. (2d) 711, certiorari denied, 271 U. S. 664 31
Soblowski v. *United States*, 271 Fed. 294, certiorari denied, 256 U. S. 697 30
Sneed v. *United States*, 298 Fed. 911, certiorari denied, 265 U. S. 590 29
Telman v. *United States*, 67 F. (2d) 716 19
United Gas Public Service Co. v. *Texas*, 303 U. S. 123 24
United States v. *Baker*, 61 F. (2d) 469, certiorari denied, 288 U. S. 602 21
United States v. *Browder*, 113 F. (2d) 97, affirmed, 312 U. S. 335 31
United States v. *Falcone*, 311 U. S. 205 25
United States v. *Lotsch*, 102 F. (2d) 35, certiorari denied, 307 U. S. 622 21
United States v. *Manton*, 107 F. (2d) 834, certiorari denied, 309 U. S. 664 ..... 17, 21
United States v. *Rabinowich*, 238 U. S. 78 29
United States v. *Rowe*, 56 F. (2d) 747, certiorari denied, 286 U. S. 554 21
United States v. *Smith*, 112 F. (2d) 83 22
United States v. *Warren*, 120 F. (2d) 211 30
Viereck v. *United States*, 318 U. S. 236 31
Watson v. *United States*, 16 F. (2d) 52, certiorari denied, 274 U. S. 739 19
White v. *United States*, 16 F. (2d) 870, certiorari denied, 274 U. S. 745 19

Statutes:

18 U. S. C. 557 21
26 U. S. C.:
Section 2550 ..... 3, 17, 33
Section 2551 ..... 3, 6, 19, 25, 29, 33
Section 2553 ..... 3, 34
Section 2554 ..... 3, 25, 34
Section 2557 36
Section 3220 ..... 3, 36
Section 3221 ..... 3, 37
Section 3224 ..... 3, 19, 29, 37

Treasury Regulations:
26 C. F. R.:
Section 151.90 ---------- 39
Section 151.182 ---------- 39
Section 151.183 ---------- 39
Section 151.185 ---------- 40
Section 151.201 ---------- 40

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 282

JACK LISS AND FRANK CONTE, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 283

CHARLES LONDONER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 284

I. DAVID COHEN AND HUEL'S CHEMISTS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 285

ALFRED MAINELLA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 286

AL N. FOX AND MAX FOX, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 287

DAVID LOWENSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority opinion (R. 898–907) and a partially dissenting opinion (R. 907–916) opinion in the circuit court of appeals have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered August 3, 1943 (R. 918). The petitions for writs of certiorari were filed August 24, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there was a variance between the indictment and proof and, if so, whether it was fatal.

2. Whether, as to each petitioner, there is sufficient evidence to support the jury's finding that

he was a party to a conspiracy charged in the indictment.

3. Whether reversible error may be found in the trial court's instructions to the jury, denial of requested instructions, or conduct of the trial, or in the conduct of Government counsel.

STATUTES INVOLVED

The pertinent provisions of the laws relating to the sale of narcotic drugs (26 U. S. C. 2550 (a), 2551, 2553, 2554, 3220, 3221, and 3224), are set forth in the Appendix, pp. 33–38.

STATEMENT

On December 11, 1941, the nine petitioners and eleven other persons were indicted in one count, in the District Court of the United States for the Southern District of New York, for conspiracy to violate seven cited sections of the laws relating to the sale of narcotic drugs [1] (R. 4–11). Of the twenty named defendants (R. 5), six pleaded guilty (see R. 2, 817–820); fourteen stood trial (see R. 16–17) and were found guilty by a jury (R. 805–806) and sentenced to terms of imprisonment ranging from three months to two years and to fines ranging from $100 to $10,000 (R. 817). Upon appeal to the Circuit Court of Appeals for the Second Circuit the convictions of the nine

[1] 26 U. S. C. 2550 (a), 2551, 2553, 2554, 3220, 3221, and 3224, set forth in the Appendix, pp. 33–38.

petitioners were affirmed (R. 898–918),[2] with one judge dissenting as to all of the petitioners other than Liss and Conte (R. 907–916).

Since each of the nine petitioners contends that the evidence was insufficient to convict him of conspiracy, it is necessary to set forth the evidence at some length.

Of the nine petitioners, Liss and Conte are the only ones who were parties from the beginning to what was done, the others having joined them later. In November 1939, Liss and Conte, with others not here concerned, began promoting a plan to manufacture synthetic morphine, and equipped a laboratory at North Bergen, New Jersey (R. 31–36, 39–41, 61–62, 78–80). Dr. Jackson, their associate, prepared experimentally a hypnotic, non-narcotic substance known as pyramidon (R. 36, 81). Liss said he would submit it to users (R. 37), and later reported that it was very satisfactory (R. 38); but the submission of

[2] The circuit court of appeals reversed the convictions of petitioners' co-defendants Geffner, Jaffe, and Palmer, for insufficient evidence to connect them with the conspiracy (R. 905–907, 916–917). On rehearing it also reversed the conviction of defendant Rudy, and directed that the indictment be dismissed as to him, on the ground that the only conspiracy to which he was shown to be a party took place wholly in New Jersey, outside the jurisdiction of the District Court for the Southern District of New York (R. 917, 919). The corporate defendant, Leading Drug Company, which was fined $10,000 (R. 817) and joined unsuccessfully in the appeal to the circuit court of appeals (R. 898, 918), has not filed a petition for certiorari.

a second sample prepared in late March or early April 1940, resulted in a report that it was "not strong enough and has not got enough shock" (R. 41–44). The plan to manufacture synthetic morphine was thereupon abandoned (44–45), but a few days later Liss and Conte discussed with Jackson the possibility of extracting opium from paregoric, Stoke's Mixture, and lead and opium wash. Jackson said that he thought it could be done, but that the percentage extracted would be too small to be worth while. Conte replied, "Well, even if the percentage is small, it is quite valuable just now." Jackson suggested some methods of extracting the opium content. (R. 45–46.) Liss, Conte, and another associate, Rudy, then brought a number of gallons of paregoric to the North Bergen laboratory, where experiments were conducted in a back room from which all but those associated in the enterprise were excluded (R. 47–50, 52, 143, 213–219, 236). Liss and Conte removed the labels from the paregoric bottles (R. 219), and Liss told the Government witness Koenig that they were engaged in producing a cure for rheumatism (R. 213, 233). The product obtained from paregoric proved unsatisfactory (R. 49–50). In June 1940 Liss announced to Conte and Jackson that "he had a simpler way of obtaining the opium from the opium-bearing material that [than] we had before" (R. 50–51).

551451—43——2

This statement by Liss was contemporaneous with a markedly increased activity, on the part of certain manufacturers and wholesalers and retailers in and around New York City, that occurred between April and November 1940 in the manufacture and sale of lead and opium wash. This is made from powdered opium, lead acetate, and water, with approximately one pound of powdered opium in 33 gallons of the wash (R. 206, 588). It is a preparation of limited narcotic content within the meaning of 26 U. S. C. 2551 (a) (Appendix, pp. 33–34). By the addition of an acid the lead may be precipitated out of the wash, leaving a solution of vinegar, water, and opium (see R. 686–687). As illustrative of the increased activity, Leading Drug Company, with which petitioner Londoner is connected (Pet. No. 283, p. 17), in 1939 manufactured 345½ gallons; in 1940 it manufactured 2,143 gallons (R. 498). In the six months prior to November 1939, Certified Laboratories of Philadelphia manufactured none; in the following eight months it manufactured 426 gallons (R. 210) and bought from Leading Drug Company 146 additional gallons (R. 196). In August 1939, Masters Drug Company of Philadelphia handled seven gallons; in 1940, following a call by Londoner upon Masters (R. 249), it bought from Leading Drug Company in New York 298 gallons (R. 251–255, 266), which were shipped from New York to Philadelphia and back again to New York (R. 255). In 1939 the govern-

ment witness Frankel, who pleaded guilty (see R. 819–820), sold from 25 to 50 gallons; in a few months of 1940 he bought from Leading, on behalf of Liss, 464 gallons (R. 496). Petitioner Huel's Chemists, Inc., which previously had handled ten or twelve gallons a year (R. 661), in 1940 bought 1,196 gallons (R. 655), which were picked up by Conte for Liss (R. 659). As will be shown, all this increased activity was generated by Liss, and a total of approximately 2,850 gallons was routed to him in the manner described below.

Liss' first purchase apparently was one of 181 gallons, made of Eimer & Amend in April 1940 (R. 319). Petitioner Londoner entered the picture in May. Government witness White, a narcotic agent, testified to an interview with Londoner on November 29, 1940, in which Londoner at first denied ever having had any lead and opium transactions with Liss, but later admitted that the preceding May Liss had asked him to procure for Liss large quantities of lead and opium wash; that he had told Liss he could not do so because Liss did not have a narcotic number registered with the Treasury Department; that he had given Liss, however, the names of several of Leading's jobbers and retailers who did have narcotic numbers, and had stated "that he would transfer quantities of lead and opium wash to those retailers and that Liss could pick up the lead and opium wash from them"; that he later learned that Liss had obtained the lead and opium

wash from these persons; and that it was true that in this manner he (Londoner) "was actually selling or causing to be sold lead and opium wash to Liss"—that "he knew he was transferring lead and opium wash to Liss through the medium of other druggists" (R. 559–560). Liss' own statement corroborates Londoner's, and adds, as an explanation, that "I told him I needed it for horses" (R. 834, 836). Leading's invoices show shipments of 1,851 gallons to eight of its customers.[3] This includes 241 gallons shown by Leading's invoices (Gov. Exs. 45 and 46, R. 321) to have been shipped to Recro Drug Corporation, with which petitioners Al and Max Fox were connected (Pet. 286, p. 13). Other evidence shows, however, that the amount received by Recro Drug Corporation from Leading was 286 gallons (R. 715). This 45-gallon discrepancy was never explained. Leading's books reflected a further shipment of 68 gallons to a Connecticut customer (Gov. Ex. 29, R. 263, 824), who testified, how-

[3] Erco Products Company, 475 gallons (Gov. Exs. 6–10, R. 154, 159); Certified Laboratories, 146 gallons (Gov. Exs. 11–15, R. 183); Masters Drug Company, 298 gallons (Gov. Ex. 25, R. 250); Harry Gerr, 76 gallons (Gov. Ex. 31, R. 293); Gloria Drug Company, 342 gallons (Gov. Ex. 37, R. 298); Government witness Frankel, who pleaded guilty (see R. 819–820), 240 gallons (Gov. Ex. 41, R. 318); Government witness Garfinkle, who also pleaded guilty (see R. 819–820), 33 gallons (Gov. Ex. 42, R. 319); Recro Drug Corporation, with which petitioners Al and Max Fox were connected (Pet. No. 286, p. 13), 241 gallons (Gov. Exs. 45 and 46, R. 321).

ever, that he neither ordered nor received any of the wash recorded as having been shipped to him (R. 263).

Government witness Goldman, proprietor of Erco Products Company, was told by Liss in June 1940, that he was in business under the name of the Frank Drug Company, at Corona, Long Island (petitioner Mainella's address), and that he wished to buy some lead and opium wash to use on horses' legs (R. 155–156, 169, 172–173). Between June 26 and October 9, 1940, Liss ordered through Goldman 475 gallons (R. 159, 177), which Goldman procured from Leading (Gov. Exs. 6–10, R. 154). The first order for 71 gallons was shipped by Leading to Goldman at Providence, Rhode Island, and brought by him in his car to New York, where he delivered it at Conte's fruit store at Liss' direction (R. 157). A second order for 100 gallons was shipped by Leading to Providence, and reshipped by Goldman to the Frank Drug Company at Corona (R. 159). Londoner told Goldman, by way of explaining the roundabout routing from New York to Providence and back to New York, that for the transaction to be legal the shipment had to be actually delivered "where it was supposed to go first on account of the order" (R. 161, 162, 165–166, 175). At Londoner's suggestion Goldman went to Certified Laboratories in Philadelphia, from which, in November 1940, he ordered 200 gallons that were

shipped to the Frank Drug Company at Corona (R. 163–165). He also ordered from Certified Laboratories four barrels of the wash which were shipped from Philadelphia to Trenton and thence taken by Goldman and his brother by truck to the Frank Drug Company at Corona, by which Goldman was paid (R. 165–166). Liss gave Mainella the cash to cover the orders shipped to him from Certified Laboratories (R. 828). For the rest that Goldman had purchased for Liss, he was paid directly by Liss (R. 158, 174). Goldman paid 80 or 85 cents a gallon and received $1.60 to $1.75 a gallon (R. 158, 170, 173–174).

Petitioner Mainella had likewise been approached in May or June 1940 by Liss, who, according to Mainella, said he knew somebody in the race-track business who wanted to use lead and opium wash as a horse liniment (R. 827), and suggested to Mainella, as sources of supply, Leading Drug Company, Gloria Drug Company, Long Island Drug Company, McKesson & Robbins Drug Company, Masters Drug Company, and Certified Laboratories (R. 393). Mainella made inquiries and told Liss he could get as much as he wanted (R. 393). Mainella subsequently ordered 40 gallons from Gloria Drug Company (R. 301–303), 10 gallons from Long Island Drug Company (R. 320), 10 gallons from McKesson & Robbins (R. 828), 5 gallons from Ormont Drug Company (R. 828), 32 gallons from Masters Drug

Company (R. 829), and 50 gallons from Certified Laboratories (R. 394–395, 397, 828). The goods were picked up for Liss by Conte (R. 394–395, 828–829). On one occasion Mainella told the Gloria Drug Company that he would have Conte pick up an order at its premises (R. 394), and directed Conte to do so (R. 401). Mainella paid 95 cents a gallon and received from Liss $1.75 a gallon (R. 394, 827). He had no records of the transactions (R. 587).

Mainella was the one who introduced Liss to petitioner Lowenstein (R. 395, 415–416). At the request of Liss, Lowenstein ordered 22 gallons from Certified Laboratories, which were picked up at the Long Island Railway depot by Conte with the bill of lading which Lowenstein had given him (R. 186–189, 415–416). Lowenstein was paid by Liss, making a profit of about $1 a gallon (R. 416). Lowenstein also procured 85 gallons from Ormont Drug & Chemical Company and turned them over to and was paid by Liss (R. 416, 242–244). Lowenstein had no records of these transactions (R. 587). Knowing that Liss was disposing of the wash to others (see R. 416), he became concerned, but was told by Liss, "No, there is nothing to worry about. If the worst comes to the worst, why I will take a year for it" (R. 417).

Petitioner Cohen and defendant Geffner were connected with petitioner Huel's Chemists, Inc., Cohen being president (R. 646–647). As stated,

Huel's Chemists ordered 1,196 gallons of lead and opium wash for Liss in 1940 (R. 655), although previously it had handled only ten or twelve gallons a year (R. 661). Most of the wash was procured from Leading's jobbers.[4] Orders by Huel's Chemists were given over the telephone by Cohen (R. 325).

Deliveries to them were C. O. D. (R. 327), with Liss advancing funds (R. 658). Huel's Chemists averaged 75 cents a gallon profit (R. 664). Conte was introduced to Cohen as the one who would pick up the wash for Liss, and on numerous occasions picked up large quantities at Huel's Chemists (R. 400–401).

When narcotic agents visited Huel's Chemists and questioned Cohen, he stated that he had been purchasing "a few gallons." When they asked

[4] 72 gallons from Certified Laboratories (Gov. Ex. 18, 18a, 19, 19a, R. 190); 99 gallons from Masters Drug Company (Gov. Ex. 28, R. 254); 64 gallons from Harry Gerr (Gov. Ex. 32–36, R. 293–296); 280 gallons from Gloria Drug Company (Gov. Ex. 38, R. 299); 36 gallons from Elvita Research Laboratories, a corporate affiliate of Leading Drug Company (Gov. Ex. 43, R. 319–320); 129 gallons from Ormont Drug & Chemical Company (Gov. Ex. 23, R. 240–241); and 165 gallons from Towns & James (Gov. Ex. 30, R. 280–283). These orders account for 845 of the 1,196 gallons purchased for Liss by Huel's Chemists. Most, if not all, of the other 351 gallons was procured from petitioners Al and Max Fox, who received 286 gallons from Leading and 65 gallons from Certified Laboratories, and disposed of most of it to Huel's Chemists (R. 430–431, 682, 715–716). The purchases from Certified Laboratories and Masters Drug Company were made by Huel's Chemists at the suggestion of Liss (R. 666).

to see them, he led the agents to the basement where they found 48 gallon bottles. Cohen at first said that a school in the neighborhood had been using quite a bit of the wash, but later stated that a man named John, whom he failed to identify, had said that he could use it on horses' feet. When asked for the concern's exempt narcotic record book, he replied that he "didn't keep one." (R. 399–400, 406.)

Petitioners Al and Max Fox operated the Recro Drug Company, a small organization engaged in jobbing pharmaceutical merchandise (R. 450). Twelve retail druggists testified to a "special deal" sponsored by Leading and promoted by Al and Max Fox, whereby each druggist, by ordering eight or nine gallons of lead and opium wash, received between four and five dollars' worth (wholesale value) of "free goods," and was allowed to return the wash, without being charged therefor, and yet keep the "free goods." As a result each druggist ordered several times his annual needs of lead and opium wash, and returned all but one or two gallons. (R. 306, 315–316, 330–332, 341–343, 346, 354, 360, 366, 373–374, 379, 384, 387, 712.) The wash was delivered to the druggists by Leading (R. 717, 728), Recro receiving a one dollar commission on each deal (R. 445, 708). The returned goods went into Recro's inventory (R. 714). Either in this manner or directly Recro received, in all, 286 gallons of lead

551451—43——3

and opium wash from Leading and 65 gallons from Certified Laboratories, and most of the 351 gallons was disposed of on telephone orders from Huel's Chemists and Mainella (R. 430, 715–716, 728–729), Mainella saying that he wanted the wash for a poison ivy lotion (R. 737). When first questioned by narcotic agents, both Al and Max Fox stated that the druggists actually received the wash, and they made no mention of its return (R. 422–423). The entries in their exempt narcotic record book (Gov. Ex. 48, R. 322, 826, 891) ended abruptly on April 29, 1940, and reflected the disposition of only nine gallons of lead and opium wash. The only explanation offered was that other books containing the required entries were lost or misplaced when they went out of business (R. 426, 715, 733–734, 743–744).

Government witness Slater, to whom Certified Laboratories shipped 31 gallons of lead and opium wash (Gov. Ex. 20a, R. 191) although he had no narcotic registry number (R. 266), testified that at the request of Liss he had received at his store deliveries that were later picked up by Liss and Conte (R. 267–278). Government witness Frankel, who pleaded guilty (see R. 819–820), and who purchased 464 gallons for Liss in a few months of 1940, although in the whole previous year he had handled only between 25 and 50 gallons (R. 496), testified that he first met Liss in May or June 1940; that Liss asked if he could buy lead

and opium wash from him, saying he wanted to use it as horse liniment; that at Liss' request he ordered 50 gallons from Leading in September 1940, Liss paying $1.65 a gallon in advance; that by prearrangement he met Conte at Leading's premises, where Conte took possession of the wash; that this was repeated in October; that on another occasion Liss urged that such direct deliveries be discontinued because the elevator boy was "kind of nosey"; that following a check of Leading by narcotic agents Liss told Frankel "to cover up the merchandise I had been giving to him, to make up those bills, well, to druggists and retail customers of mine, and in other words to cover up the whole transaction that way," and that the lead and opium business was going to continue "as long as the war lasts"; and that Londoner had stated to him, in January 1941, when prosecution was imminent, that he (Londoner) had been "getting a rake-off" (R. 458–469, 471, 485–486). Government witness Garfinkle, another defendant who pleaded guilty (see R. 819–820), testified that Londoner was the one who had introduced him to Liss; that Liss had offered to finance alterations for the purpose of making his business premises look like a manufacturing establishment; that Liss and Londoner asked him to join them in a scheme for diverting alcohol from legitimate channels; and that on November 20, 1940, after the narcotic agents had

become active, Londoner told him by phone to "cover up" and not say anything about the lead and opium wash transactions (R. 501–505, 509-512). Londoner had urged both Frankel and Garfinkle to take greater quantities of wash than they had ordered (R. 460–461, 504–505), and gave Frankel a bonus of one additional gallon for every ten ordered (R. 460–463).

None of the lead and opium wash was traced beyond Liss. In their statements (Gov. Exs. 61, 73, R. 831, 834), Liss and Conte said it was disposed of to a man whose first name was Mack. By way of discrediting the story that it was to be used on race horses, the Government called as a witness a veterinarian who testified that lead and opium wash had not, to his knowledge, been used in the treatment of horses since the enactment of the Narcotic Law in 1914 (R. 762–767).

ARGUMENT

I

All nine petitioners contend that the Government's proof showed several separate conspiracies instead of the single one alleged; that this constituted a variance which prejudiced the jury's consideration of their case, and hence was fatal; and that their convictions were sustained upon a theory of guilt advanced for the first time on appeal (Pet. No. 282, pp. 3, 13–16; Pet. No. 283, pp. 2–4, 12–15; Pet. No. 284, pp. 4–5, 10; Pet. No. 285, pp. 2–4, 15–16; Pet. No. 286, pp. 3–4, 11–13; Pet. No. 287,

pp. 3, 10–12). We submit that such contentions are without merit.

Petitioners have been convicted of the only conspiracy alleged in the indictment, i. e., one to violate the narcotic laws (R. 5).[5] The circumstances narrated in the Statement (*supra,* pp. 4–16) were viewed by Government counsel in his opening statement (R. 23–24) as constituting three *phases* of a single continuing conspiracy. As the trial judge charged (R. 800) and the circuit court of appeals held (R. 899), the plan to manufacture synthetic morphine was not, standing by itself, a conspiracy at all, since the statute (26 U. S. C. 2550 (a), Appendix, p. 33) covers only opium and cocoa leaves and their derivatives. Evidence of this plan was properly admissible as showing the desire of petitioners Liss and Conte to profit from the market provided by narcotic users—in other words as showing a part of the "collocation of circumstances" by which a conspiracy normally is proved.[6] The circuit court of appeals held further, however, that the proof showed two different conspiracies, the "paregoric conspiracy" and the "lead wash conspiracy;" that "The content of the two was altogether different. The 'paregoric conspiracy' was to extract opium from 'preparations of limited narcotic content'; the 'lead wash con-

[5] The remaining paragraphs of the indictment (R. 5–11) allege merely methods by which the conspiracy was to be accomplished, and overt acts by which it was promoted.

[6] *United States* v. *Manton*, 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664.

spiracy' was to allow Liss and Conte to procure 'lead wash' for use not 'as medicine,' and for resale contrary to the regulations;" and that there was, therefore, "a variance between allegation and proof," although not a fatal one (R. 900–901).

We submit that what the court called separate "paregoric" and "lead wash" conspiracies were in fact but different phases of a single continuing conspiracy to violate the narcotic laws. The plan to extract opium from opium-containing products embraced lead and opium wash as well as paregoric (R. 46), and Liss' announcement, after the paregoric experiments had failed, that "he had a simpler way of separating the opium from the opium-bearing material" (R. 50), is more indicative of a purpose to secure opium through dealings in lead and opium wash than of a purpose merely to resell lead and opium wash illegally. As shown in the Statement (*supra,* p. 16), the evidence admittedly failed to trace any of the lead and opium wash beyond Liss; consequently the record does not sustain the court's statement that there was a second conspiracy differing from the first in that its purpose was to enable Liss to procure lead and opium wash "for resale contrary to the regulations" (R. 901). The important factor that links the two phases, as parts of a single conspiracy to violate the narcotic laws, is that under those laws Liss' purpose, so long as it was not medicinal, is immaterial. Possession by Liss of the paregoric used in the experiments at the North Bergen labor-

atory, and his subsequent purchases of lead and opium wash, were illegal for exactly the same reason, namely, that his purpose was not medicinal.[7] Dealing in opium products illegally was the common purpose of both phases of the conspiracy. This being true, it matters not that seven of the petitioners did not join with Liss and Conte until the later stage was reached.[8]

---

[7] The statute (26 U. S. C. 2551 (a), Appendix, pp. 33–34) "does not purport to exempt from the operation of the act the sale of all preparations which do not contain more than two grains of opium to the fluid ounce, but only such preparations of that character as are sold, distributed, given away, dispensed, or possessed as medicine, and not for the purpose of evading the intentions and provisions of the act." *Oliver* v. *United States*, 267 Fed. 544, 546 (C. C. A. 4); see, also, *Morris* v. *United States*, 123 F. (2d) 957, 959 (C. C. A. 5). By 26 U. S. C. 3224 (c) (Appendix, p. 38), unregistered possession is made presumptive evidence of a violation and the burden of proving exemption under 26 U. S. C. 2551 (a) (Appendix, pp. 33–34) is placed upon the defendant. *Nelson* v. *United States*, 298 Fed. 93, 94 (C. C. A. 5); *Watson* v. *United States*, 16 F. (2d) 52 (C. C. A. 9), certiorari denied, 274 U. S. 739; cf. *White* v. *United States*, 16 F. (2d) 870, 872 (C. C. A. 9), certiorari denied, 274 U. S. 745.

[8] *Telman* v. *United States*, 67 F. (2d) 716, 718 (C. C. A. 10); see also *Marcante* v. *United States*, 49 (2d) 156, 157 (C. C. A. 10). The opinion of the circuit court of appeals that there were two separate conspiracies in the instant case necessarily implies that petitioners Liss and Conte might have been indicted separately for each. Yet this is doubtful in the light of this Court's holding in *Braverman* v. *United States*, 317 U. S. 49, 52, that "a single agreement to commit acts in violation of several penal statutes is to be punished as one" rather than as several conspiracies. Here Liss and Conte had but one general agreement, which the other petitioners successively joined.

While we submit, therefore, that the court below was improvident in conceding the existence of a variance, it correctly held that in any event petitioners were not improperly prejudiced. In relying upon numerous federal cases decided prior to 1935, petitioners overlook the fact, alluded to in *Blumenthal* v. *United States,* 88 F. (2d) 522, 531 (C. C. A. 8), that "all precedents established by the federal courts on this subject were superseded or modified" by the decision in that year of *Berger* v. *United States,* 295 U. S. 78, 82, where this Court stated: "Evidently Congress intended by the amendment to Section 269 [of the Judicial Code (28 U. S. C. 391)] to put an end to the too rigid application, sometimes made, of the rule that error being shown, prejudice must be presumed; and to establish the more reasonable rule that if, upon an examination of the entire record, substantial prejudice does not appear, the error must be disregarded as harmless," and that—"The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be pro-

tected against another prosecution for the same offense."[9]

It cannot seriously be contended in the present case that there was such a variance between allegations and proof as to take any of the petitioners by surprise or to deny him protection against another prosecution for the same offense. And as the circuit court of appeals pointed out (R. 901), from the standpoint of fairness to the accused the question "is like that of joining separate crimes in separate counts of a single indictment, or of consolidating separate indictments for trial [under 18 U. S. C. 557]; the propriety of either depends upon the danger they create that the jury may confuse the issues." Such joinder rests, however, in the sound discretion of the trial court.[10] Where the requirements of the joinder and consolidation statute (18 U. S. C. 557) are otherwise observed, "differences among defendants are not objectionable," and consolidation is

[9] *Accord*, *Meyers* v. *United States*, 3 F. (2d) 379, 380 (C. C. A. 2); *United States* v. *Rowe*, 56 F. (2d) 747, 748–749 (C. C. A. 2), certiorari denied, 286 U. S. 554; *United States* v. *Baker*, 61 F. (2d) 469, 470 (C. C. A. 2), certiorari denied, 288 U. S. 602; *United States* v. *Manton*, 107 F. (2d) 834, 849–850 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Cooper* v. *United States*, 91 F. (2d) 195, 198 (C. C. A. 5); *Chadwick* v. *United States*, 117 F. (2d) 902, 904 (C. C. A. 5), certiorari denied, 313 U. S. 585; *Blumenthal* v. *United States*, 88 F. (2d) 522, 531–532 (C. C. A. 8).

[10] *Pointer* v. *United States*, 151 U. S. 396, 400–404; *United States* v. *Lotsch*, 102 F. (2d) 35, 36 (C. C. A. 2), certiorari denied, 307 U. S. 622.

clearly permissible where "the charges are so closely connected that all the evidence produced in court would have been admissible if any one of the indictments had been brought to trial alone."[11] In the instant case, had what the court below deemed the separate conspiracy to extract opium from preparations of limited narcotic content been brought to trial alone, there can be no doubt that Liss' continuing purchases of lead and opium wash could have been shown in evidence since it is a preparation of limited narcotic content and was in fact embraced by such conspiracy (R. 46);[12] and conversely, had what the court

[11] *United States* v. *Smith*, 112 F. (2d) 83, 86 (C. C. A. 5); *Davis* v. *United States*, 12 F. (2d) 253, 256 (C. C. A. 5), certiorari denied, 271 U. S. 688; *Caringella* v. *United States*, 78 F. (2d) 563, 567 (C. C. A. 7).

[12] Petitioners Cohen and Huel's Chemists are in error when they assume (Pet. No. 284, p. 6) that the so-called "paregoric conspiracy" failed of proof. That the attempt to extract marketable opium from paregoric failed of success did not render the crime of conspiracy any the less complete, since the necessary overt act in furtherance of the unlawful purpose need not itself be criminal. *Braverman* v. *United States*, 317 U. S. 49, 53. Here, however, as shown (*supra*, pp. 18–19), possession of the paregoric for a nonmedicinal purpose was itself criminal. Likewise, the circuit court of appeals was in error in stating that the conspiracy to extract opium from preparations of limited narcotic content was abandoned in April 1940 (R. 899). All that was shown to have been abandoned was the attempt to extract marketable opium from paregoric (R. 49–50); and it was not until June 1940 that Liss made the announcement, consonant with continued attempts to extract opium from lead and opium

called the separate "lead wash" conspiracy been brought to trial alone, there can be no doubt that the prior attempt of Liss and Conte to extract opium from paregoric could have been shown in evidence.[13] It follows that neither Liss and Conte, who were parties throughout to all that was done, nor the seven other petitioners, who had no part in the North Bergen experiments, were prejudiced improperly by the presentation at one trial of the entire series of acts done in furtherance of the illegal plan, to violate the narcotic laws, inaugurated by Liss and Conte but later joined in by the others.[14] Prejudice is not to be presumed from the mere fact that a jury may have difficulty in

---

wash, that "he had a simpler way of obtaining the opium from the opium-bearing material" (R. 50–51). In the meantime he had commenced purchasing large quantities of lead and opium wash, and had made his contacts with Londoner (R. 559–560), Goldman (R. 155–156), Mainella (R. 827), and Frankel (R. 458–469).

[13] The court below held that "it was competent on the issue of their intent [Liss' and Conte's] to show that they had a criminal intent on earlier occasions" (R. 902). It also would have been admissible as showing a purpose of the lead and opium wash purchases.

[14] Petitioners Cohen and Huel's Chemists are in error in stating (Pet. No. 284, p. 10) that "almost the entire ten days of trial was consumed with evidence by witnesses concerning the first two conspiracies which it is conceded the petitioners herein were not a part of." Actually only 212 record pages (R. 29–152, 211–240, 587–600, 612–644, 749–761) out of 739 pages devoted to testimony deal with the two earlier phases of the conspiracy, and throughout these 212 pages it was at all times apparent that the petitioners other than Liss and Conte were not involved.

determining complicated issues.[15] As the circuit court of appeals aptly concluded, "if we are to clutch at such shadows, the criminal prosecution of complicated crime beomes impossible, and the phantom of the innocent man convicted will prevent any effective enforcement of the law" (R. 902).

II

Petitioners severally contend (Pet. No. 282, pp. 3, 11–13; Pet. No. 283, pp. 5, 15–17; Pet. No. 284, pp. 6, 11–14; Pet. No. 285, pp. 4, 12–15; Pet. No. 286, pp. 5, 13–15; Pet. No. 287, pp. 3, 19–20) that the evidence was insufficient to convict them of a conspiracy charged in the indictment. As previously stated (*supra,* p. 17), the only conspiracy of which the petitioners have been charged and convicted is one to violate the narcotic tax laws. As previously shown, Liss was not a registered dealer (*supra,* p. 7); the purchase or possession by him for any non-medicinal purpose of a preparation of limited narcotic content, such as either paregoric or lead and opium wash, was illegal (*supra,* pp. 18–19; Appendix pp. 33–34); possession by an unregistered person is presumptive evidence of a violation on his part, and the burden of proving exemption is placed upon him (*supra,* p. 19; Appendix, p. 38); and none of the petitioners had adequate records reflecting his transactions in

[15] Cf. *United Gas Public Service Co.* v. *Texas*, 303 U. S. 123, 140–141.

lead and opium wash (*supra,* pp. 8–9, 11, 13, 14), as required by law (26 U. S. C. 2551 (a); Appendix, pp. 33–34), or showed that his sales were made pursuant to written orders, as likewise required by law (26 U. S. C. 2554 (a); Appendix, pp. 34–35).

All of the petitioners other than Liss and Conte rely primarily upon this Court's decision in *United States* v. *Falcone,* 311 U. S. 205, which is cited for the proposition that "mere knowledge that goods which he sells may be put to an illegal use is insufficient" to render a seller guilty as a co-conspirator with the buyer (Pet. No. 287, p. 19). But petitioners overlook the fact that in *Direct Sales Co., Inc.* v. *United States,* No. 593, October 1942 Term, decided June 14, 1943, this Court made it clear that the *Falcone* case decided only that the sale of free articles of commerce, with knowledge that the buyer may use them for an illegal purpose, is insufficient of itself to link the seller into a conspiracy, of which he had no knowledge, between the buyer and others to use the articles illegally; and that the problem of linking the buyer and seller "in a conspiracy *inter sese*" was not there presented. That sale alone, in abnormally large quantities, of restricted articles of commerce such as narcotic drugs, subject as they are "to sale by order form, registration [and] other requirements" and to black-market sales to drug addicts, may sufficiently link the buyer and seller into "a conspiracy *inter sese,*" is

the holding of the *Direct Sales* case. Where the conspiracy into which they are thus linked as between themselves has identically the same objects as one already in existence between the buyer and others, the seller in effect has joined the main pre-existing, continuing conspiracy. For it is not essential to membership that one understand the entire scope of the conspiracy or know all the participants therein; it is sufficient that one knows its purposes in a general way and participates in their furtherance.[16] In the instant case the Fox brothers are the only ones of the petitioners whom the evidence does not clearly show to have had direct relations with Liss and Conte and to have known of the relation between them whereby Conte picked up the wash for Liss. But as to them, as the court below held, "it was certainly permissible for a jury to conclude from their bizarre transactions, all set on foot by Londoner, that they knew that the sales were part of some kind of illicit traffic. * * * It was not necessary that they should have dealt with Liss, or even have known him in the transactions; all that was necessary was that they should be engaged

[16] *McDonnell* v. *United States*, 19 F. (2d) 801, 803 (C. C. A. 1), certiorari denied, 275 U. S. 551; *Galatas* v. *United States*, 80 F. (2d) 15, 23 (C. C. A. 8), certiorari denied, 297 U. S. 711; *Craig* v. *United States*, 81 F. (2d) 816, 822 (C. C. A. 9), certiorari denied, 298 U. S. 690; *Martin* v. *United States*, 100 F. (2d) 490, 495–496 (C. C. A. 10), certiorari denied, 306 U. S. 649.

in a scheme which involved the disposition of the wash in violation of the statute and regulation, and that that scheme was the one charged in the indictment. The evidence justified that conclusion." (R. 906.) The following language of the *Direct Sales* opinion is, it is submitted, as pertinent to all of the seven druggists here as to the mail-order house which it immediately concerned:

> The difference between sugar, cans, and other articles of normal trade, on the one hand, and narcotic drugs, machine guns and such restricted commodities, on the other, arising from the latters' inherent capacity for harm and from the very fact they are restricted, makes a difference in the quantity of proof required to show knowledge that the buyer will utilize the article unlawfully. Additional facts, such as quantity sales, high-pressure methods, abnormal increases in the size of the buyer's purchases, etc., which would be wholly innocuous or not more than ground for suspicion in relation to unrestricted goods, may furnish conclusive evidence, in respect to restricted articles, that the seller knows the buyer has an illegal object and enterprise. Knowledge, equivocal and uncertain as to one, becomes sure as to the other. So far as knowledge is the foundation of intent, the latter thereby also becomes the more secure. * * * The step from knowledge to intent and agreement may be taken.

> There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. There is informed and interested cooperation, stimulation, instigation. And there is also a "stake in the venture" which, even if it may not be essential, is not irrelevant to the question of conspiracy. Petitioner's stake here was in making the profits which it knew could come only from its encouragement of * * * illicit operations. In such a posture the case does not fall doubtfully outside either the shadowy border between lawful cooperation and criminal association or the no less elusive line which separates conspiracy from overlapping forms of criminal cooperation.

In the *Direct Sales* case the petitioner was held not to be excused "merely because in the absence of excesses such as were committed and in other circumstances the order form would have given it protection." In the instant case the order forms and records required to give the transactions legality under any circumstances were lacking—a factor itself evidential of the wrongful intent with which the transactions were conducted. The evidence of guilt was therefore, we submit, still clearer than in the *Direct Sales* case.[17]

---

[17] The contention of petitioners Liss and Conte (Pet. No. 282, pp. 11–13) that there was no proof of a plan whereby the wash was to be disposed of illegally by them, overlooks the fact that a plan merely to provide them with the wash was itself an illicit one within the indictment, since they were not registered dealers and since the jury was amply justified

III

Concerning petitioners' contention (Pet. No. 282, pp. 3, 16–20; Pet. No. 283, pp. 4–5, 18–19; Pet. No. 284, pp. 5–6, 15–17; Pet. No. 285, pp. 4, 15–16; Pet. No. 286, pp. 4–5, 15–17; Pet. No. 287, pp. 3, 12–18) that the trial judge was biased against them, resulting in their being denied a fair trial, the court below concluded (R. 902–903):

> It may perhaps have been true that at times his manner was not as urbane as could have been wished, and counsel may have occasionally smarted under his admonitions; but we can find no evidence that he improperly cut short their examination, and certainly none whatever that he expressed even indirectly any opinion as to the guilt of the accused.

The record references on which petitioners rely in support of their contention carry their own

---

in inferring, even apart from the presumption provided by 26 U. S. C. 3224 (c) (Appendix, p. 38), that their purpose was not medicinal. Nor can any of the other petitioners properly contend (see Pet. No. 283, p. 16) that the intermediate transactions, made without order forms or adequate records and so palpably for the purpose of transferring the wash ultimately to Liss, were "not for the purpose of evading the intentions and provisions of this subchapter" and therefore legal within the meaning of 26 U. S. C. 2551 (a) (Appendix, pp. 33–34). Finally, the contention (see Pet. No. 286, p. 13) that if two persons "in fact have committed the crime they may not be convicted of a conspiracy to commit it," is patently unsound. *United States* v. *Rabinowich*, 238 U. S. 78, 85–86; *Sneed* v. *United States*, 298 Fed. 911 (C. C. A. 5), certiorari denied, 265 U. S. 590.

refutation, illustrating only the type of proper exercise by a trial judge, of control over the proceedings, that has been rejected as a ground for reversal as frequently as it has been urged.[18] The trial judge's intrusion upon the questioning of witnesses was in no sense comparable to that which was held to constitute reversible error in *Adler* v. *United States,* 182 Fed. 464, 470–474 (C. C. A. 5), certiorari denied, 223 U. S. 733, in conjunction with an error in the charge, or in *Frantz* v. *United States,* 62 F. (2d) 737, 739 (C. C. A. 6), where the court expressly recognized that a federal judge may "propound such questions to witnesses as seem to him essential to the proper development of the case." Here the charge (R. 779–801), although described by the court below as a "wilderness" of "verbiage" (R. 903), contained no error and omitted no essential as regards these petitioners, who clearly are not entitled to urge, as prejudicial to them, the denial of their codefendant Rudy's request that the jury be told that he had no connection with the "lead wash" conspiracy (R. 802, 874). Petitioners took no exception to the charge (see R. 801–802), and mere verbosity is not the type of "plain error" that an appellate court will

[18] *Horning* v. *District of Columbia*, 254 U. S. 135, 137–139; *Soblowski* v. *United States*, 271 Fed. 294, 295 (C. C. A. 2), certiorari denied, 256 U. S. 697; *United States* v. *Warren*, 120 F. (2d) 211, 212 (C. C. A. 2); *Cusmano* v. *United States*, 13 F. (2d) 451, 452–453 (C. C. A. 6), certiorari denied, 273 U. S. 773.

notice, without exception, to prevent injustice.[19] Error may not be predicated upon the denial of petitioner Londoner's requested instructions (R. 875–882), for the reason that all the essentials thereof, to the extent that they were correct statements of the law, were embodied in the charge given.

The comments of the prosecuting attorney of which petitioners complain (Pet. No. 282, pp. 18–20; Pet. No. 284, p. 17; Pet. No. 287, pp. 17–18) likewise bear not the slightest resemblance to the conduct that this Court deemed to constitute reversible error in *Berger* v. *United States,* 295 U. S. 78, 84–89, or to the conduct that it rebuked in *Viereck* v. *United States*, 318 U. S. 236, 247–248. Defense counsel apparently construed some of the prosecutor's remarks in summation as an adverse comment upon the fact that not all of the petitioners called character witnesses (R. 777–779). Neither the specific comment nor its context is included in the record. There is, therefore, no adequate basis for appellate review. *Silkworth* v. *United States,* 10 F. (2d) 711, 721 (C. C. A. 2), certiorari denied, 271 U. S. 664. Furthermore, the trial judge construed the prosecutor's remarks as prefatory to comment on the testimony of the character witnesses who were called (see R. 777),

[19] *Fabian* v. *United States*, 15 F. (2d) 696 (C. C. A. 2); *United States* v. *Browder*, 113 F. (2d) 97, 100 (C. C. A. 2), affirmed, 312 U. S. 335.

which would have been proper;[20] and in any event he directed the jury to "disregard all statements about character witnesses" (R. 779). Such a flimsy basis for alleged error is in no sense comparable to that which was held sufficient in *Lowdon* v. *United States,* 149 Fed. 673, 675 (C. C. A. 5), certiorari denied, 210 U. S. 434, and in *McNight* v. *United States,* 97 Fed. 208, 211 (C. C. A. 6). "If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." *Dunlop* v. *United States,* 165 U. S. 486, 498.

CONCLUSION

Petitioners had a fair trial and, for the reasons stated, the cases present no question warranting review on certiorari. It is, therefore, respectfully submitted that the petitions should be denied.

CHARLES FAHY,
Solicitor General.

TOM C. CLARK,
Assistant Attorney General.

OSCAR A. PROVOST,
EDWARD G. JENNINGS,
Special Assistants to the Attorney General.

SEPTEMBER 1943.

---

[20] *Pollard* v. *United States,* 261 Fed. 336, 339 (C. C. A. 5), certiorari denied, 252 U. S. 577.

APPENDIX

The laws relating to the sale of narcotic drugs in pertinent part provide (26 U. S. C. 2550, 2551, 2553, 2554, 2557, 3220, 3221, 3224):

SECTION 2550. *Tax*—(a) *Rate.*—There shall be levied, assessed, collected, and paid upon opium, coca leaves, any compound, salt, derivative, or preparation thereof, produced in or imported into the United States, and sold, or removed for consumption or sale, an internal revenue tax at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce. * * *

* * * * *

SECTION 2551. *Exemptions*—(a) *Preparations of limited narcotic content.*—The provisions of this subchapter and part V of subchapter A of chapter 27 shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium, * * * in one fluid ounce, * * * or to liniments, ointments, or other preparations which are prepared for external use, only, * * * *Provided,* That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this subchapter and said part V: *Provided further,* That any manufacturer, producer, compounder, or vendor (including

dispensing physicians) of the preparations and remedies mentioned in this section lawfully entitled to manufacture, produce, compound, or vend such preparations and remedies, shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Secretary shall direct. Such record shall be preserved for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, * * * and every such person so possessing or disposing of such preparations and remedies shall register as required in section 3221 and, if he is not paying a tax under section 3220, he shall pay a special tax of $1 for each year, or fractional part thereof, in which he is engaged in such occupation, to the collector of the district in which he carries on such occupation as provided in part V of subchapter A of chapter 27.

* * * * *

SECTION 2553. *Packages*—(a) *General requirement.*—It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; * * *.

* * * * *

SECTION 2554. *Order forms*—(a) *General requirement.*—It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given,

on a form to be issued in blank for that purpose by the Secretary.

* * * * *

(c) *Other exceptions.*—Nothing contained in this section, section 2563, or section 2564 shall apply—* * *

(2) *Prescriptions.*—To the sale, dispensing, or distribution of any of the drugs mentioned in section 2550 (a) by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under section 3221: * * *

* * * * *

(d) *Preservation.*—Every person who shall accept any order required under subsection (a), and in pursuance thereof shall sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a), shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose * * *.

* * * * *

(f) *Supply.*—The Secretary shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors for sale by them to those persons who shall have registered and paid the special tax as required by sections 3221 and 3220 in their districts, respectively; and no collector shall sell any of such forms to any persons other than a person who has registered and paid the special tax as required by said sections in his district.

(g) *Unlawful use.*—It shall be unlawful for any person to obtain by means of said

order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession.

* * * * *

SECTION 2557. Penalties— * * * (b) *Violations in general.*—

(1) Any person who violates or fails to comply with any of the requirements of this subchapter or part V of subchapter A of chapter 27, shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court.

(2) Any person required under this subchapter or section 3220 to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter or section 3220, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

* * * * *

SECTION 3220. *Tax.*—On or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation

thereof, shall pay the special taxes hereinafter provided. Every person upon first engaging in any of such activities shall immediately pay the proportionate part of the tax for the period ending on the following June 30.

(a) *Importers, manufacturers, or producers.*—Importers, manufacturers, producers, or compounders, lawfully entitled to import, manufacture, produce, or compound any of the aforesaid drugs, $24 per annum;

(b) *Wholesale dealers.*—Wholesale dealers, lawfully entitled to sell and deal in any of the aforesaid drugs, $12 per annum;

(c) *Retail dealers.*—Retail dealers, lawfully entitled to sell and deal in any of the aforesaid drugs, $3 per annum; * * *

* * * * *

SECTION 3221. *Registration*—(a) *Requirements.*—On or before July 1 of each year every person who engages in any of the activities enumerated in section 3220 shall register with the collector of the district his name or style, place of business and place or places where such business is to be carried on, and every person upon first engaging in any such activities shall immediately make like registration.

* * * * *

SECTION 3224. *Unlawful acts in case of failure to register and pay special tax*—(a) *Trafficking.*—It shall be unlawful for any person required to register under the provisions of this part or section 2551 (a) to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this part, or section 2551 (a).

(b) *Transportation.*—It shall be unlawful for any person who shall not have registered and paid the special tax as required by sections 3220 and 3221 to send, ship, carry, or deliver any of the aforesaid drugs from any State or Territory or the District of Columbia, or any insular possession of the United States, to any person in any other State or Territory or the District of Columbia or any insular possession of the United States: * * *

(c) *Possession.*—It shall be unlawful for any person who has not registered and paid the special tax as provided for by this part or section 2551 (a), to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this subsection and subsection (a), and also a violation of the provisions of sections 3220 and 3221: *Provided,* That this subsection shall not apply to any employee of a registered person, or to a nurse under the supervision of a physician, dentist, or veterinary surgeon registered under this part or section 2551 (a), having such possession or control by virtue of his employment or occupation and not on his own account; or to the possession of any of the aforesaid drugs which has or have been prescribed in good faith by a physician, dentist, or veterinary surgeon registered under this part or section 2551 (a); * * * *Provided further,* That it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceeding laid or brought under this part or subchapter A of chapter 23; and the burden of proof of any such exemption shall be upon the defendant.

The Treasury Regulations relating to the sale of narcotic drugs in pertinent part provides (26 C. F. R. 151.90 et seq.):

SECTION 151.90 *When forms not required.* The use of order forms is not required:

* * * * *

(e) For the sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than 2 grains of opium * * * in 1 fluid ounce * * *; or of liniments, ointments, or other preparations which are prepared for external use only, * * * provided that such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this Act and that a record of dispositions is kept as required by § 151.185.

SECTION 151.182 *Restrictions on dispositions.*— * * * A manufacturer may produce and sell as exempt only preparations readily capable of use for claimed medicinal purposes, and sales thereof, if not to consumers, shall be made only to persons registered in Class V. Sales made to consumers, either by manufacturers or dealers shall be made only in such quantities and with such frequency to the same purchaser as will restrict their use to the medicinal purpose for which intended.

SECTION 151.183 *Dispositions to dealers.*— Orders for exempt preparations except where sold to a registrant in Class VI are not required to be on any particular forms, but an order from a dealer shall not be honored by a manufacturer or other dealer

unless it bears the registry number of the dealer giving the order. * * *

* * * * *

SECTION 151.185 *Records required.*—Every manufacturer, producer, compounder, or vendor (including dispensing physicians), of exempt preparations shall record all sales, exchanges, gifts, or other dispositions, the entries to be made at the time of delivery. Separate records shall be kept of dispositions to registrants and of dispositions to consumers. The record of dispositions to registrants shall show the name, address, and registry number of the registrant to whom disposed, the name and quantity of the preparation, and the date upon which delivery to the registrant, his agent or a carrier is made. The record of dispositions to consumers shall show the name of the recipient, his address, the name and quantity of the preparation, and the date of delivery.

* * * * *

SECTION 151.201 *Records open to inspection.*—Any officer, agent, or employee of the Treasury Department authorized to enforce the Act, * * * shall have authority to examine the books, papers, and records kept pursuant to the regulations in this part, and may require the production thereof.

All order forms, duplicate forms, prescription records, returns, and inventories required under the Act or the regulations in this part to be kept on file shall be kept so that they can be readily inspected.

U. S. GOVERNMENT PRINTING OFFICE: 1948